COPYRIGHT LAW REVISION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

H.R. 2223

COPYRIGHT LAW REVISION

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COPYRIGHT LAW REVISION

THURSDAY, JUNE 12, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Badillo, Pattison, Railsback, and Wiggins.

Also present: Herbert Fuchs, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order for the purpose of continuing our hearings on matters related to copyright revision. I will encourage both the members of the committee and the witnesses, particularly in colloquies, to be as concise as possible. We are confronted with the fact the House will be in session at 10 o'clock, and undoubtedly there will be interruptions this morning. So that we can continue in an orderly fashion and get the substance of the testimony, I will encourage the colloquies to be as brief as possible.

This morning during the first segment of the hearing, the committee would like to hear about the issue involving news archives. There are two witnesses present who will address themselves to that question. First, I would like to call Mr. Robert Evans, who is vice president and general counsel of Columbia Broadcasting, on the question of the news archives.

You are welcome, as you were 10 years ago. Will you commence.

[The prepared statement of Mr. Robert V. Evans follows:]

STATEMENT OF ROBERT V. EVANS, VICE PRESIDENT AND GENERAL COUNSEL, CBS INC.

My name is Robert Evans. I am Vice President and General Counsel of CBS. I appear today to oppose those provisions of section 108, namely subsection (f)(4) and subsection (h), which, in our opinion, discriminate unfairly against owners of "audiovisual news programs" by making their rights inferior to the rights of the owners of other copyrighted works. Moreover, the problem addressed by these unusual provisions is not one that requires Congressional action because it is being resolved by private initiative.

Section 108 deals with limited reproduction and distribution rights for libraries and archives. Subsection (f)(4) provides that "Nothing in this section—shall be construed to limit the reproduction and distribution of a limited number of copies and excerpts by a library or archives of an audiovisual news program * * *." Subsection (h) tracks the language I have just quoted—for the purpose of making clear that, although musical, pictorial, graphic and sculptural works—as well as motion pictures and other audiovisual works—are specifically excluded from the reproduction and distribution rights granted in section 108, audiovisual works dealing with news are not so excluded.

A law that says creators of television news programs—and those creators are not confined to the television networks, because two-thirds of television news programs are created by local stations rather than the networks—receive less protection than the creators of television entertainment programs seems manifestly unfair. Why should a local station that produces a documentary on a subject of national interest find that outsiders, who made no contribution whatsoever to its creation, are perfectly free under the law to reproduce it without permission or payment? It is true that subsection (f)(4) speaks of a "limited number of copies and excerpts," but whatever that limited number is, it may very well represent the entire market for the program. It has always been the theory of our copyright law that copyright protection exists to encourage the creation of superior works and that the best way to do that is to ensure that their creators would be financially rewarded if the works found public acceptance. I submit that subsection (f)(4) has just the opposite effect for audiovisual news programs.

Not only is this provision unfair; it is also unnecessary. We understand that it was introduced by Senator Baker to insure the continuation of the Vanderbilt University Archive. But the Vanderbilt Archive is hardly a national repository. CBS has no objection to the establishment of a genuine national repository of television programs in the Library of Congress, along the lines proposed in Senator Baker's 1973 bill. With a few minor clarifications CBS would be happy to support the enactment of such legislation.

However, even should national repository legislation not be enacted, subsection (f)(4) is unnecessary because CBS last year entered into an agreement with the National Archives and Records Service pursuant to which CBS delivers a recording in the form of a video tape cassette of every hard news broadcast presented on the CBS Television Network. These cassette recordings are available for viewing by researchers and others at the National Archives in Washington, and copies of the recordings are also available at the 11 Branch Archives throughout the country, at the six Presidential Libraries and at public, college, university, and other libraries everywhere in the United States.

Subsection (f)(4) is also unnecessary because CBS recently put into effect a new policy under which it is licensing schools and school districts for as little as $25 a year to record off the air programs of THE CBS MORNING NEWS, THE CBS EVENING NEWS, and THE CBS WEEKEND NEWS for in-school educational and instructional purposes.

We are confident that the other networks will not leave these fields to CBS alone.

In short, the problem of access to recordings of news broadcasts is being resolved by private initiative.

To summarize—subsection 108(f)(4) and the provision of subsection 108(h) which makes an exception of "an audiovisual work dealing with news" are not only discriminatorily undesirable, they are also unnecessary. They should be stricken from the bill.

TESTIMONY OF ROBERT V. EVANS, VICE PRESIDENT AND GENERAL COUNSEL, CBS, INC.

Mr. EVANS. My name is Robert Evans. I am vice president and general counsel of CBS. I appear today to oppose those provisions of section 108, namely subsections (f)(4) and subsection (h), which in our opinion, discriminate unfairly against the owners of audiovisual news programs by making their rights inferior to the rights of the owners of other kinds of copyrighted works. Moreover, the problem addressed by these unusual provisions is not one that requires Congressional action because it is being resolved by private initiative.

Section 108 deals with limited reproduction and distribution rights for libraries and archives. Subsection (f)(4) provides that "nothing in this section shall be construed to limit the reproduction and distribution of a limited number of copies and excerpts by a library or archives of an audiovisual news program." Subsection (h) tracks the language I have just quoted for the purpose of making clear that al-

though musical, pictorial, graphic, and sculptural works, as well as motion pictures and other audiovisual works, are specifically excluded from the reproduction and distribution rights granted in section 108, audiovisual works dealing with news are not so excluded.

A law that says creators of television news programs—and those creators are not confined to the television networks, because two-thirds of television news programs are created by local stations rather than the networks—a law that says creators of news programs receive less protection than the creators of entertainment programs seems manifestly unfair.

Why should a local station that produces a documentary on a subject of national interest find that outsiders, who made no contribution whatsoever to its creation, are perfectly free under the law to reproduce and distribute it without permission or payment? It is true that subsection (f)(4) speaks of a limited number of copies and excerpts, but whatever that limited number is, it may very well represent the entire market for the program.

It has always been the theory of our copyright law that copyright protection exists to encourage the creation of superior works and that the best way to do that is to insure that their creators would be financially rewarded if the works found public acceptance. I submit that subsection (f)(4) has just the opposite effect for television news programs.

Not only is this provision unfair; it is also unnecessary. We understand that it was introduced by Senator Baker to insure the continuation of the Vanderbilt University Archive. But the Vanderbilt Archive is hardly a national repository. CBS has no objection to the establishment of a genuine national repository of television programs in the Library of Congress, along the lines proposed in Senator Baker's 1973 bill. With a few minor clarifications CBS would be happy to support the enactment of such legislation.

However, even if national repository legislation is not enacted, subsection (f)(4) is unnecessary because CBS last year entered into an agreement with the National Archives and Records Service pursuant to which CBS delivers a recording in the form of a video tape cassette of every hard news broadcast presented on the CBS television network. These cassette recordings are available for viewing by researchers and others at the National Archives here in Washington, and copies of the recordings are also available at the 11 branch Archives throughout the country, at the 6 Presidential libraries, and at public, college, university, and other libraries everywhere in the United States.

Subsection (f)(4) is also unnecessary because CBS recently put into effect a new policy under which it is licensing schools and school districts for as little as $25 a year to record off-the-air programs of the CBS morning news, the CBS evening news, and the CBS weekend news for in-school educational and instructional purposes. We are confident that the other networks will not leave these fields to CBS alone.

In short, the problem of access to recordings of news broadcasts is being resolved by private initiative.

To summarize, subsection 108(f)(4) and the provision of subsection 108(h) which makes an exception of an audiovisual work dealing

with news are not only discriminatorily undesirable, they are also unnecessary. We urge they be stricken from the bill.

Mr. KASTENMEIER. Thank you, Mr. Evans.

What is the practice today for, let's say, CBS and Vanderbilt University as an archive. Do they purchase a cassette or a film of your news shows?

Mr. EVANS. No; they do not. They are recording off the air, without our permission, and indeed, we began a lawsuit against them a couple of years ago to stop them from doing it.

Mr. KASTENMEIER. Has that lawsuit been resolved?

Mr. EVANS. No; it is pending and we have had some talks. We are trying to resolve it without having to go to trial. We are hopeful. I think the people at Vanderbilt are hopeful we are going to find a solution, since we are really not in opposition on what we want to achieve. They want to do the same thing we want to do, which is make it possible for teachers, scholars, or anybody who wants to see what was on the news yesterday or last week or last month or last year, researching—find a way people can do that with some convenience.

I guess where we disagree is really on the matter of principle as to whether we have got a copyright in our news program, or whether we do not. Only a court can answer that if we cannot work it out between us. But I am hopeful we will be able to resolve our dispute.

Mr. KASTENMEIER. I take it the Senate must have concluded that with respect to television news programs of a special character, like a daily newspaper, copyright applied. They have a spontaneous value, but as a short period of time goes by, they have little residual value except for documentary purposes, unlike entertainment shows, which could be shown many times and have many intrinsic values. I do not know that, but I would assume that there must be some special reason why news programs were selected out as having a different quality than other works that might be protected in this fashion. Would you not agree?

Mr. EVANS. I have read—the only available material, I think, is the Congressional Record and what Senator Baker said when he introduced the bill. I do not think he cast it in those terms. I think rather he put it on a basis that if the bill were enacted, he had an opinion from the Register of Copyrights that the Vanderbilt Archive would be stopped from doing what they were doing unless they could work out a license agreement with CBS. I think he put it on that basis, that this was needed to keep the Vanderbilt Archive in operation.

Mr. KASTENMEIER. The same principle would apply, of course, to NBC and to ABC and to any local news program, I assume.

Mr. EVANS. Yes; it would. And the dollars, of course, as you pointed out, Mr. Chairman, the dollars are not enormous in terms of what any news organization can realize after the first broadcast. But once in a while, they will be especially good or lucky, and they will get something that has some lasting value, maybe regionally, maybe locally, maybe nationally. And even if they are then able to get another $1,500 or $2,000 out of it by licensing its use, in news terms, that is a lot of money. That is a lot of money at CBS, because news is not a money-making proposition, and any dollar you can make is a real dollar in the news business. I think that is even more particularly true at smaller stations. That is why I feel it is a hard thing to do, to say that

news programs are not going to be protected in the way an entertainment program is. A lot of people might say, gosh, they ought to have more protection, maybe, because that is the best of television. That is the best thing they do.

Mr. KASTENMEIER. What present arrangement do you prefer to make? That is to say, do you prepare video tape cassettes which you sell, including a licensing for display, to institutions?

Mr. EVANS. Yes; we do. Not of hard news, as you pointed out earlier—more of the news documentaries. The news public affairs programs find a market and we sell those, of course, regularly through commercial channels—not ourselves; we have distributors who handle those for us. We are trying to build that business up. Our news division is trying to break even too. They never do, but as a source of income for them, it is a business opportunity they do not want to see taken away. It is a small market, that is the trouble. You can say, oh, what harm will it do if 15 or 20 or 30 libraries around the country make copies and distribute them as the bill says they may. How is that going to hurt anybody? It is a small market, and you may only have 15 or 20 or 30 sales. That is the trouble, if those are satisfied through this provision.

Now, if this becomes copyright law, we are not going to be able to sell anything.

Mr. KASTENMEIER. It is also true that principally, news shows are produced not for the residual copyright value but for the immediate showing and sponsorship.

Mr. EVANS. That is true.

Mr. KASTENMEIER. There is no distinction in the bill. It just says news, audiovisual news programs, all lumped in together.

I yield to the gentleman from New York, Mr. Badillo.

Mr. BADILLO. You say the problem is being resolved by private initiative. How is it being resolved in the library in my neighborhood in the Bronx, for example?

Mr. EVANS. CBS is only one network, one of the three. We have an agreement with the National Archives pursuant to which we send them——

Mr. BADILLO. I understand that. Then they would have to buy it in my neighborhood?

Mr. EVANS. Suppose you want to see the Walter Cronkite news for some day last month or last year. You can go to your local library and say, would you please apply to the National Archives under the interlibrary loan agreement, and get me this episode, this program. And in due course—I do not know how fast it happens—but in due course, your library would get that, and you will be able to look at it as much as you want to.

Mr. BADILLO. At no cost to the library?

Mr. EVANS. That is my understanding. That is part of the service the National Archives provides.

Mr. BADILLO. Are any other networks doing this?

Mr. EVANS. No, sir. We hope they will come along. We do not think that our competitors are going to let CBS become the network of record, as it were. We think they will follow along.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I am also interested in, not so much the commercial application of this, but just the fact it gets done by somebody—I do

not care how it is done. But I think that it is a tragedy if you cannot go back to June 6, 1945 and look at the news like you can with the New York Times or any other major newspaper. And I just—it has not been done up until the time Vanderbilt really started it. It is being done now by CBS only, and I would be very interested in your suggestion to where we could somehow insure, not just on a whim of CBS, but we can insure somehow that this is done, because I think it is a very important kind of thing of our national history.

Mr. EVANS. I think Senator Baker's 1973 bill pointed the way. The theory of that was that as a condition to getting copyright, you would deposit a copy or two copies with the Library of Congress, and then it would be there for everybody. CBS would—we supported it at the time. We support it today. We think there should be a national repository of these broadcasts where anybody can go and see them.

Mr. KASTENMEIER. Suppose we could limit this in some way by allowing various archives to take the evening news—and by the way, parenthetically, you were talking about documentaries; I do not think that is the intention of anybody to steal a documentary; I think that is a work of art and does have lasting impact. I think we are talking about the evening news, morning news, or whatever. Suppose you could have a provision that said that the archives could gather this information without permission, without copyright violation, but that they could not exploit it commercially without some sort of preclearance or permission. So that it would be there just for, primarily, scholars and people who—which I think is the only thing it is going to be used for anyway. I do not think any of us want to see somebody come into an archives and take pieces of news and put together a program without recognizing that somebody is owed something for that.

Talking about just using it for scholarly research, or unscholarly research, without exploiting it commercially, suppose we could put a provision in there. Would that be acceptable to the networks, or CBS?

Mr. EVANS. I do not think we could support that, because no one whose copyright is embodied in a film or a tape likes to be in a situation where there are going to be 20 or 30 or 40 copies of it floating around. The thing slips away from you. Inevitably, you are no longer the owner of anything. That is why we thought it would be much better to have this material at the Library of Congress where everyone could be sure it would not only be available but the owner could be sure it was not going to be misused or mistreated or copied or excerpted or anything like that, at least not without the owner's permission.

I think we would rather see some genuine national repository than a lot of smaller ones, lesser ones around the country.

Mr. PATTISON. But there would have to be specific noncopyright legislation for that purpose?

Mr. EVANS. Yes, there would be.

Mr. PATTISON. It would not be covered by what we are doing here?

Mr. EVANS. I do not think so. There would have to be some language, a new bill or an amendment to this bill. I think it is within the power of the Congress to enact such legislation.

Mr. PATTISON. I have no further questions.

Mr. KASTENMEIER. Does the gentleman from Massachusetts have any questions?

Mr. DRINAN. Thank you, Mr. Chairman.

Does this cover "Face the Nation," "Issues and Answers"?

Mr. EVANS. As I take it, I think it would. Those are considered news programs. They are produced by our news division, and by the news divisions of the other networks.

Mr. DRINAN. Why did you not include them in your agreement with schools, therefore? You get $25 a year from schools to record off-the-air programs, but that does not extend to the CBS half hour on Sunday?

Mr. EVANS. That is right, because when we went out into the field to see what school districts wanted, their emphasis was on the hard news broadcasts for the classroom teaching purpose. I do not think there would be any reason why—if somebody said, we would like to include that too. I am sure we would be very happy to have that suggestion made to us; but this is where we started.

Mr. DRINAN. Your language on that $25 is somewhat ambiguous, that you lease things or allow this for as little as $25 a year.

Mr. EVANS. Yes; it goes up to—I am trying to remember what the top figure is. I will have to guess $3,000 a year or something like that.

Mr. DRINAN. $3,000 for a school?

Mr. EVANS. That would be for a school district, perhaps, with 250,000 students.

Mr. DRINAN. Whether they take advantage of it or not?

Mr. EVANS. That is right. But the thing here is, the school records off the air. Once they get a license from us, they just turn on their Sony tape recorders and make as many copies as they want. Their only obligation is to wipe the tape, I think after 30 days, because the school people we talked to—said that would be about the useful life of anything like that. We tried to make it cheap for the small school systems, but then larger districts for an entire State came to us, and we have been negotiating with some large units who said we would like to have it for all the students in our State. We do not think—I think it is $2,500 or $3,000, $3,500 a year—we do not think that is an unreasonable fee for making copies for uses in all the classrooms in a State.

Mr. DRINAN. They get the picture, as well as the sound?

Mr. EVANS. Yes; they get the whole thing, and then they do what they want with it, make copies or whatever. Our only requirement is that at the end of a month, they wipe the tape.

[Subsequent to the hearings the following letter was received for the record:]

CBS, INC.
New York, N.Y., July 3, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. KASTENMEIER: At the June 12, 1975 hearing on section 108 of H.R. 2223 I testified on behalf of CBS in opposition to those provisions of section 108, namely subsection (f)(4) and subsection (h), which in our opinion, discriminate unfairly against owners of "audiovisual news programs" by making their rights inferior to the rights of other owners of copyrighted works. I also testified that the problem addressed by these unusual provisions is not one that requires Congressional action because it is being resolved by private initiative.

As part of my demonstration of resolution by private initiative, I testified that CBS recently put into effect a new policy under which it is licensing schools and school districts for as little as $25 a year to record off the air programs of THE CBS MORNING NEWS, THE CBS EVENING NEWS, and THE CBS WEEKEND NEWS for in-school educational and instructional purposes. During the course of my testimony, Mr. Drinan asked how high the charges for such licenses

go, and I responded that my belief was that the charges go as high as $3,000 or $3,500 for a whole school district. This appears on pages 14 and 15 of the transcript.

I was mistaken in my response. The fact is that for the largest school districts (those with pupil enrollment of over 500,000) the maximum annual fee is $500.

I regret not having had this information in mind during the hearing and respectfully request that this letter be put into the record so that my error may stand corrected.

Sincerely,

R. V. Evans.

Mr. Drinan. Mr. Chairman, I have several more questions, but I will defer them at this time.

Thank you.

Mr. Kastenmeier. Thank you, Mr. Evans. We appreciate your presence this morning.

Next, the Chair would like to call Mr. Paul C. Simpson.

Mr. Simpson, you have a brief statement, you may proceed.

[The prepared statement of Mr. Paul C. Simpson follows:]

Statement of Paul C. Simpson

Mr. Chairman and members of the subcommittee: I am Paul Simpson of Nashville, Tennessee, and am appearing here today as an individual citizen at my own expense. I have, for over seven years now, been interested in the fact that network television news is recognized as the most important source of information about national and international affairs. I have therefore, believed that it should be retained as broadcast and made as easily and readily available as technology permits, for research, review and study both now and in the future. Since learning in 1968 that these broadcasts were not being retained at the networks or elsewhere, I have devoted a great deal of time to this matter.

In 1968 I was instrumental, financially and otherwise, in the establishment of the Vanderbilt Television News Archive at Vanderbilt University in Nashville, Tennessee. This has been and is the only existing operative archive of video tapes of all three network television evening news programs.

I have read with great interest the attached page S16162 of *Congressional Record*—Senate of September 9, 1974. I would like to endorse the remarks of Senator Howard Baker as reported on this page and request permission to include this page S16162 as part of my statement.

I not only favor the passage of a copyright bill that would not prevent Vanderbilt from doing what it is doing in its television news archive operation but also one that would not prevent any library in the Country from doing the same. I recognize that it is probable that costs involved by the present state of technology make necessary one or two collections of network television news open for use on a national basis. Because the expense involved makes it financially unlikely that there will be many such collections, it is important that the tapes in these collections be as readily and easily available as possible.

This in turn, makes it imperative that any collection now established or that may be established by congressional action or by library action not be thwarted by the Copyright Law in making this material available to the public for reference, research and study. The proliferation of video tape recorders and players will make—and in many instances already has made—it as reasonable for a library user to view video tape material in his home as for him to read a library book there, or a copy of a library newspaper there. The copyright law should not prevent libraries making television news material as easily and as conveniently available as they make other such news material available from the library. With regard to television news as with other library news materials, if the original copy cannot be taken away from the library, then the library should be free to make copies for the user to use away from the library. And the user should be free to obtain individual news stories and news items from a television news collection as he is to get copies of news stories and news items from newspapers in the library.

To permit the copyright law to be so revised as to be useful in blocking public access to old television news broadcasts would be an injury to the public interest.

That the public has the right to see old television news broadcasts—and by "old" is meant those already aired—is substantiated by publicly granted privileges which, if withheld, would make the existence of television news impossible. For a very small fee television stations are licensed by the public to use the publicly owned airwaves. Because the airing of news via television is deemed to be for the public good and in the public interest, television stations are required by law to air news broadcasts. And the news broadcasters are granted exceptional privileges, even by proposed H.R. 2223 itself. For example: Copyrighted materials such as books, newspapers, and magazines may be quoted and otherwise used in "news reporting" with or without permission of the copyright holder; under Section 107 of H.R. 2223. And other privileges are extended. For example: Newsmen, including television newsmen—with their lights and their cameras—are permitted access to publicly owned property, denied to the average citizen, (certainly an individual equipped with cameras and lights) in order to gather the news. To have, then, an exclusive-rights copyright that would, in effect, deny the average citizen access to these news stories as televised, (after being televised—at a profit to the network) except with the express permission of the broadcaster, does not seem to be proper.

To summarize, the newly revised copyright legislation should not prohibit libraries from:

(1) Recording news broadcasts from the air;

(2) Making them available for viewing at the library and copies for viewing elsewhere;

(3) Making, at specific request, copies of single stories or news items from the broadcasts available, just as such services are rendered by libraries from newspaper collections.

These privileges should be granted to libraries and the users of libraries for the following reasons:

(1) Television news broadcasts are too significant as a record of the times not to be retained as aired.

(2) Broadcasters themselves have traditionally not retained these programs.

(3) Libraries are beginning to recognize their own obligations in this regard.

(4) Television news is now being recognized by scholars as significant source material.

(5) Television news is broadcast for the public good and in the public interest.

(6) Television broadcasters enjoy privileges granted by the public which makes television news possible.

(a) right to use airwaves.

(b) exemption from copyright restrictions on material used as part of "news reporting".

(c) access to and freedom of use of public property, including installation of such equipment as lights and cameras, which is denied the average citizen but which is granted the newsman to assist him in performing his work of gathering the news.

Libraries should have the same right to collect and circulate television news broadcasts that they have traditionally had to collect and circulate copies of newspapers and other forms of print journalism. The revised copyright law should not abridge this right, of the libraries and so of the general public.

For these reasons I urge the retention in H.R.2223 of Section 108(f)(4) and the words "other than an audiovisual work dealing with news" in Section 108(h).

Thank you for the privilege of appearing before you.

[From the Congressional Record—Senate, Sept. 9, 1974]

Mr. Baker. Mr. President, I send to the desk a modification of the amendment necessitated by the reprinting of the bill as reported, and ask that the amendment be modified accordingly.

The Presiding Officer. That is the Senator's privilege.

The modification is as follows:

On page 1, line 1, strike "On page 10," and insert in lieu thereof "On page 94,".

On page 1, line 2, strike "On page 10," and insert in lieu thereof "On page 94,".

On page 1, line 9, strike "On page 11," and insert in lieu thereof "On page 95,".

The amendment as modified is as follows:

On page 94, line 40, strike out the period.

On page 94, between lines 40 and 41, insert the following:

"(4) shall be construed to limit the reproduction and distribution of a limited number of copies and excerpts by a library or archives of an audiovisual news program subject to clauses (1), (2), and (3) of subsection (a).".

On page 95, line 16, immediately before the comma, insert "other than an audiovisual work dealing with news".

The PRESIDING OFFICER. The Senate will be in order. The Senator from Tennessee has the floor.

Mr. BAKER. Mr. President, I ask unanimous consent that the names of the distinguished senior Senator from Florida (Mr. GURNEY), the distinguished Senator from Arizona (Mr. GOLDWATER), and my colleague from Tennessee (Mr. BROCK) be added as cosponsors of this amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BAKER. Mr. President, amendment 1803, as amended, will insure that if S. 1361 becomes law, the Vanderbilt University Television News Archive located in Nashville, Tenn., can continue operation.

For many years historians and other scholars have relied extensively on contemporary news accounts in their research into American past. Universities, libraries, and other institutions have long realized the value of preserving newspapers, periodicals, books, and other printed matter for this purpose. The advent of microfilm and computer techniques have made the reproduction and storage of printed material far more practical.

However, today radio and television are major news forces. Although the print media continue to exert great influence and are capable of providing the kind of indepth coverage often beyond the capacity of broadcast journalism, television is documenting the mainstream of the continuing evolution of civilization. Historic events of thousand-year importance are being recorded in a most professional and marvelous way. Because many Americans depend upon television for much of their information about national and international matters, their perception of these matters is undoubtedly affected by television news. Certainly a thorough understanding of the Vietnam war or the events of the Watergate period, would be incomplete without reviewing the television network news reports produced during those times in our history.

Despite the obvious importance of preserving network television news, we have no institution performing this function on a permanent and systematic basis.

At the present time, however, Vanderbilt University operates a television news archive—a depository that contains tapes of the evening news programs and special news events of the three television networks for that period. The television news archive makes off-the-air videotape recordings of the evening television news, prepares indexes of the contents and leases copies of complete broadcasts or compilations of coverage of specified subjects for specified periods upon request from scholars and researchers. Although a fee is charged those using the archive which is based upon the cost of production, the operation of Vanderbilt's archive has been financed solely by private contributions.

Vanderbilt is to be commended for the pioneering efforts it has made in this field. However, because we need the guarantee of a national commitment from the Federal Government, I introduced S. 2497 to require the Librarian of Congress to establish and maintain a library of television and radio programs, and for other purposes. Unfortunately, no action has been taken on this bill and therefore our only means of preservation of the nightly news on an organized basis which is accessible to all Americans is at the Vanderbilt Television News Archive.

I have been advised by the Register of Copyrights that under S. 1316 as reported by the Judiciary Committee, none of the special exemptions from exclusive rights would absolve Vanderbilt of copyright liability. Thus, if S. 1361 passes in its present form, Vanderbilt would have to negotiate with each of the networks for the right to continue their operation, with all of the uncertainties such negotiations involve.

The work that Vanderbilt is doing is too important to the Nation to risk it not being continued until we have made a national commitment to serve the nightly news and special news events produced by the three television networks.

Inasmuch as this activity is strongly impressed with the public interest, it seems to me that my amendment asks little of the three major networks who have been given use of a valuable public resource through their television licenses which are conditioned solely on their obligation to serve the public interest, convenience, and necessity.

I urge my colleagues to study this amendment as amended and consider the implications of failing to insure Vanderbilt's continued operation.

I ask unanimous consent that the name of the Senator from South Carolina (Mr. THURMOND) be added as a cosponsor of the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. PASTORE. Mr. President, will the Senator yield?

Mr. BAKER. I yield.

Mr. PASTORE. How far does this go? We talk about local news and we talk about national news. How far does the amendment go? I mean, I think the amendment has tremendous merit, but I wonder what the cost is going to be, and what the essentiality of it is.

Mr. BAKER. Mr. President, I appreciate the question of the distinguished chairman of the subcommittee.

This amendment will cost the Government nothing, because the cost of the service is borne by Vanderbilt University and by nonprofit trusts that are created on behalf of Vanderbilt University to carry this out. The amendment provides that it shall be fully lawful under this act for Vanderbilt University to continue to make these tape recordings at its own expense, and make available the tapes for scholars and researchers, and not for commercial use.

Mr. PASTORE. Mr. President, I believe it is a valuable amendment, and the Commerce Committee is willing to accept it.

The PRESIDING OFFICER. The question is on agreeing to the amendment, as modified, of the Senator from Tennessee.

The amendment, as modified, was agreed to.

Mr. BAKER. I move to reconsider the vote by which the amendment was agreed to.

Mr. PASTORE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

TESTIMONY OF PAUL C. SIMPSON, NASHVILLE, TENN.

Mr. SIMPSON. Mr. Chairman and members of the subcommittee, I realize that you have an extremely busy schedule today and with your permission I would like to read just part of the statement.

Mr. KASTENMEIER. Without objection the remainder of your statement together with the attachment will be accepted as part of the record.

Mr. SIMPSON. Thank you. I am Paul Simpson of Nashville, Tenn., and I am appearing here today as an individual citizen at my own expense. I have, for over 7 years now, been interested in the fact that network television news is recognized as the most important source of information about national and international affairs.

I have therefore believed that it should be retained as broadcast and made as easily and readily available as technology permits, for research, review, and study both now and in the future. Since learning in 1968 that these broadcasts were not being retained at the networks or elsewhere, I have devoted a great deal of time to this matter.

In 1968 I was instrumental, financially and otherwise, in the establishment of the Vanderbilt Television News Archive at Vanderbilt University in Nashville, Tenn. This has been and is the only existing operative archive of video tapes of all three network television evening news programs.

I would like to let the statement speak for itself and make some comments at this time. First of all, about Senator Baker's proposal for the Library of Congress and the reaction of CBS to that proposal. I have been involved in this matter now since the spring of 1968 and when I found that the network programs were not being retained anywhere in the United States, persuaded Vanderbilt University to set up an archive for the purpose of keeping the evening news. I furnished

the original relatively small amount of money to start with and that amount of money ran out very shortly. And then I was able to get money from others to continue it.

In January of 1969 I visited all three networks and made an effort to get them to take over the program of retaining the news and making it available. In the spring of 1969, four members of Congress, a Republican Senator from Tennessee, a Republican Congressman from Tennessee, a Democratic Senator from Tennessee, a Democratic Congressman from Tennessee (in the Nashville district) wrote a joint letter to the Library of Congress asking that they look into the question of this material being kept at the Library of Congress.

The Library of Congress sent three people to Nashville to see what the Vanderbilt television news archive was doing and then wrote letters to the presidents of all three networks. I am sorry to say that while two of the networks responded, to the best of my knowledge, the then president of CBS did not acknowledge the first letter from the Library of Congress nor did he acknowledge a follow-up letter written in the fall of that year.

I mention that for one purpose and one purpose only, I think that the urgency of this news material being kept and being made available, both now and in the future, is just too strong to permit it to depend on a network deciding to or not to keep the material or to or not to make it possible for somebody else to; and because I did have experience in 1969 to indicate there was no real interest on the part of CBS in the material being kept and being made available.

In regard to the agreement with the National Archives which was made, the final agreement was made last year, I would like to comment briefly on that. The agreement for the National Archives provides that they (CBS) will furnish tapes to the National Archives, that these tapes will be available for viewing at the National Archives at the branches of the National Archives or the Presidential Libraries.

I understand, at the present time, that equipment for viewing the tapes is not available in the branch libraries and I am of the opinion that it is not available at this point in the National Archives. It seems to me, I am sure, that the viewing equipment will be made available but I think it is going to be extremely difficult for a student, a person in Tennessee, to have to go to Atlanta, Ga., and look at a copy of a tape which has been secured by the Georgia office from the National Archives in Washington. I do not think they will have the money to be able to do that.

So far as the interlibrary loan agreement is concerned, the interlibrary loan agreement specifically excludes undergraduate college students. It applies only to graduate students and professors. I think it is absolutely essential that we begin to develop in this country a body of researchers of television and think the only way you can do that is to have college students begin to think about doing it while they are undergraduate students. So, to exclude them I think would be a very bad thing to do.

The agreement also contains a specific provision that the tapes cannot be taken out of the library. Unfortunately, my research over 7 years, and this is something I hope will be changed, but my research indicates that almost no libraries at the present time have video tape viewing equipment. On a great many college campuses, the viewing

equipment is in a resource learning center which is most often not in the library, most often not controlled by the library. That is something else I personally think should be changed but that is the condition existing now.

So, under the agreement between CBS and the National Archives, the library would not have viewing equipment and the tapes could not be taken, even across the campus to another building, to the resource center or to some department that might have video tape viewing equipment. The agreement with the National Archives is limited to a 2-year basis with renewal being negotiated at that time. I think those are some of the faults of the National Archives arrangement.

So far as the school systems are concerned, I have only heard of one school system that has signed up for that, there may be others. I am intrigued by the requirement that the tapes must be erased within 30 days. It would mean, for example, that a professor who wanted to use a tape would certainly have to rush it into his schedule because at the end of 30 days it would have to be erased and he could not use it.

I feel that television news is one of the most important news sources in this country today. Every survey indicates that more people get their knowledge about national and international affairs from the network news programs than they do from any other source. Mr. Taylor, president of CBS, was quoted in Broadcasting magazine of May 5, 1975, on page 14, when he appeared in the Senate in regard to the Fairness Doctrine, to have said: "It is a potential tool for determined and unscrupulous public officials to destroy what is, in effect, the only national daily press that this diverse Nation has."

It does not seem proper to me for all of the local presses to be available and then for the only national press not to be available both now and in the future. I am of the opinion that instead of access to it being restricted, I think, as the other two networks apparently think, it is so important that it should be as widely available as possible.

Thank you, sir.

Mr. KASTENMEIER. Mr. Simpson, thank you for your statement. You are not officially associated with Vanderbilt University or Vanderbilt television news archive at Vanderbilt?

Mr. SIMPSON. The word "official" is a little bit bothersome to me. I am an unpaid administrative consultant and a member of the three-man administrative committee of the archives. My pay is poor but my hours are extremely good.

Mr. KASTENMEIER. Mr. Simpson, you are fully familiar nonetheless with the relationship of Vanderbilt University's problem with Columbia Broadcasting System, I take it?

Mr. SIMPSON. I graduated from law school many years ago and the word "fully" bothers me; I am not fully informed about everything that takes place. I do know a great deal about it, yes, and I am not trying to dodge the issue, it is just a fact.

Mr. KASTENMEIER. I am trying to determine how much of this you are personally familiar with. Are you familiar with the suit, the ongoing suit.

Mr. SIMPSON. Yes, sir.

Mr. KASTENMEIER. Is it your understanding that NBC and ABC pose no particular objections to what Vanderbilt University is doing in terms of its news archive?

Mr. SIMPSON. We understand that is correct. My own personal knowledge, I do not know of my own personal knowledge, I have read accounts stating that to be true.

Mr. KASTENMEIER. You stated, however, you received two letters, letters from two networks presumably not the——

Mr. SIMPSON. I am sorry, I must have misspoken.

Mr. KASTENMEIER. You said you or the university had heard from two networks concerning——

Mr. SIMPSON. The Library of Congress in 1969 wrote all three networks and it did not receive word from two.

Mr. KASTENMEIER. As far as news programs go, do you understand that news program does not include interview shows and news documentaries and other public affairs presentations?

Mr. SIMPSON. I would understand it in a term of hard news programs in the way that the networks use it. I would also understand it in the same context, the same meaning as a "news reporting" in section 107 of the proposed Copyright bill which gives to the networks themselves and other news people the right to use copyright material.

Mr. KASTENMEIER. There is a substantial difference, is there not, between an archival use of material and educational use of ephemeral material such as that described by Mr. Evans, that is to say, that which is thought to be sold and erased after 30 days as a transitory educational use of the material. But when you talk about archival use, you are talking about long-term preservation of materials, are you not?

Mr. SIMPSON. Yes; I think that because of the expenses involved and the present state of technology there are only going to be a very few archives of television news material. I think that will change sometime in the future but now it is going that way so I think whatever archives existed should be available on a national basis and should be as easily available as possible.

Mr. KASTENMEIER. The reason I raised that is your description of the use of this collection of Vanderbilt tends to be somewhere between a true archival preservation and an educational use. You talk about it being available to the undergraduates of Vanderbilt in some sort of educational process as opposed to strictly a preservational archival use of the material.

Mr. SIMPSON. I very strongly believe it should be available for both purposes. It is an expensive operation—particularly expensive for a library to undertake. We, for example, estimate that only about $2 to $3 out of each $100 of money spent is retrieved in service fees, so it is very expensive. I think it would be too expensive just to keep it for current years, too expensive just to keep it for use 25 or 50 years from now. So, I think if you can combine the two, that is what should be done.

Mr. KASTENMEIER. We have preserved much of motion picture films over the years, although some of the older motion picture films have decayed. Is it your intention that this be preserved over a long period of time, in perpetuity or scholarship uses of those you may wish to examine many, many years hence?

Mr. SIMPSON. Yes; I think it should be preserved for a long time. And we are somewhat worried by the fact that we do not know how long video tape will last. Definitely the material which Vanderbilt has, which goes back to 1968, should be transferred to archival quality film. It is just that the money has not been available to do that.

Mr. KASTENMEIER. The gentleman from Massachusetts?

Mr. DRINAN. Thank you very much.

I wonder, Mr. Simpson, whether you would say, pursuant to what you say on page 4, that Vanderbilt and every library should have the same rights with regard to CBS news that they have with regard to the New York Times and Atlantic Monthly.

You say you have traditionally been able to collect and circulate copies of newspapers and other forms of print journalism. I take it you would say there is no difference and that the librarians should have the same rights to both media?

Mr. SIMPSON. It seems to me the only difference would be—because of what has taken place—there should be even more importance in keeping television news than the other—print news.

Mr. DRINAN. Aside from the importance, the television you would say has no greater right than the print media as far as copyright?

Mr. SIMPSON. No; in fact, it seems to me, they have less because the television people do have some certain public rights granted to them which newspapers, for example, do not have, such as the use of public airways. I do have figures and I know we do not have time for them, but it—television—is not an unprofitable business and it seems to me that it is not asking too much of them to give up, what in my opinion as a sales manager and a salesman for 38 years, is not a big income, in order to make this material available.

Mr. DRINAN. Going back to the practice of CBS in selling the rights to reprint on a photograph, CBS Morning News to various schools; would you think the New York Times would have that right or would not have.

Mr. SIMPSON. I do not know, sir.

I would question very strongly, and this is based on talking with newspaper people over these 7 years, I would question very strongly whether or not they would want to exercise a right to sell.

I know you can go into any library in the country, and I checked with the Library of Congress yesterday, you can go in and make copies of excerpts from newspapers. I think we would consider that the New York Times was very unavailable if there were only one copy of the microfilm of the New York Times in one place in the United States.

Mr. DRINAN. On page 2 of your testimony, I am not certain that the electronic media are granted exceptional privileges under the bill. You suggest that under the proposed bill that section 107 gives special privileges to the electronic media. I think that goes for all the media, does it not?

Mr. SIMPSON. That is correct. Yes, sir.

Also may I correct an error on page 2 which I intended to correct when I started. The bottom of the page says required "by law" to air news broadcast. "By law" is not correct. There is no law I understand but as a matter of practice of the FCC, any local television station that had no news program would have an extremely difficult time in getting their license renewed.

Mr. DRINAN. Are you completely satisfied for your purposes with H.R. 2223 or would we have to also add the bill of Senator Baker?

Mr. SIMPSON. I am just interested so far as the pending bill is concerned that it not prohibit news archiving and library activity. I am very much of the opinion that there should be a national archive for news.

Mr. DRINAN. Is Senator Baker's bill necessary in addition to this bill to carry out all your purposes?

Mr. SIMPSON. I suspect that some sort of national funding is necessary. They have had some difficulty at Vanderbilt in raising the funds to keep it operating. I think it should be on a guaranteed basis.

Mr. DRINAN. Aside from the funding, sir, for copyright purposes must we add Senator Baker's bill to H.R. 2223.

Mr. SIMPSON. I do not think so for copyright.

Mr. DRINAN. Thank you very much.

Mr. KASTENMEIER. I just have one or two questions left.

Subsection 4 says a limited number of copies. How many copies did you have in mind? Might there be the necessity of a number of copies?

Mr. SIMPSON. I do not know. I might say this, I agree very strongly with the theory that there should be no commercial competition with the networks and I suppose that the reason for putting any limited number of copies would be that you want to emphasize that point.

The Vanderbilt television news archive procedures contain a provision, for example, that the material cannot be duplicated or rebroadcast and that is signed before anybody rents the material.

Mr. KASTENMEIER. My second question is, and my first question was directed to see whether again we were talking about archival use or educational use. Educational use might need a number of copies, archival use would not need so many copies.

My last question is, to your knowledge, is Vanderbilt the only entity other than potentially the Library of Congress which is presently engaging in this practice?

Mr. SIMPSON. Yes, sir, it is and the National Archives.

Mr. KASTENMEIER. Are there any other universities or other institutions public or semi-public, that have an interest in the use to which you have directed yourself in Vanderbilt?

Mr. SIMPSON. Yes; the Vanderbilt archives has received requests from all over the world for this information. The monthly index and abstracts published at Vanderbilt University are being distributed to about 7 or 8 foreign countries by request; and also to approximately 450, mainly libraries, in this country.

The point is, Mr. Chairman, that this material is so expensive, just the cost of the raw tape for example, that it almost has to be, for the present time, available in one or two locations; but available to other locations through copies of the tapes on a rental basis or through the request of a compiled tape on certain selected cases that they have picked out, they want to see.

Mr. KASTENMEIER. Thank you, Mr. Simpson. Next, the Chair would like to proceed to the question of cable television and section 111, in H.R. 2223.

First, as one of the representatives of the motion picture industry, the Chair will like to call Mr. William K. Howard, who is president of the Hollywood Film Council.

[The prepared statement of William K. Howard follows:]

STATEMENT OF WILLIAM K. HOWARD, PRESIDENT OF THE HOLLYWOOD FILM COUNCIL

Mr. Chairman and Members of the Subcommittee. My name is William K. Howard. My address is 1427 North La Brea Avenue in Hollywood, California. I am the President of the Hollywood Film Council, made up of the 27 largest craft unions and guilds in the motion picture industry. Their members are

engaged in the production of films for theater, television and cable viewing. Appended to my statement, which I will not take your time to read now, is a list of the craft unions and guilds for whom I am authorized to speak and that are united in the Hollywood Film Council. These unions and guilds have a membership of some 60,000 men and women whose livelihood depends directly on the viability of the American film industry.

I am here, Mr. Chairman, at the direction of the Film Council and its membership to express their deep concern on the question of the payment of copyright. I have been asked by Mr. Chester Migden, Executive Secretary of the Screen Actors Guild, to express his personal regret at his inability to be present today to speak for the Screen Actors. The officials of his guild are meeting in San Francisco today. We welcome this opportunity to express our views and are grateful to you and the Members of the Subcommittee for the opportunity to appear here.

Let me say first that we endorse in general terms the passage of the Chairman's bill, H.R. 2223, in short, the requirement that royalty payments be made for the use of copyrighted materials. We support fully the viewpoint expressed by Mr. Valenti, President of the Motion Picture Association of America, and request the most careful and serious consideration of the changes and modifications he has urged.

The enactment of an up-to-date copyright law is essential and important to labor. It is a bread and butter issue for those who work in Hollywood and New York in the production of film. Some people seem to have the idea that copyright royalty is something that accrues only to an already rich author, or composer, or maybe a highly-paid actor, or even to some large corporation. Maybe that's because the word "royalty" seems to connote something kingly or rich.

For the record, let me make it very clear that payments for the use of copyrighted material in the film industry mean employment—jobs—for thousands of people. Payment for copyright means both jobs and more money for carpenters, painters, electricians, teamsters, cameramen, costumers, grips, projectionists, property men and many others. In Mr. Migden's behalf, I speak also for the Hollywood creative guilds whose membership includes such creative people as actors, screen extras, film editors, musicians, writers, and directors. All are beneficiaries of copyright royalty payments.

We have experienced tremendous unemployment in Hollywood. Today, you people in Congress are concerned about an unemployment rate of 8% in the country. Last year unemployment rates in Hollywood ranged from a low of 10½% to 89% in our unions and guilds with a combined average unemployment rate of almost 40% across the board. VARIETY, the film industry trade paper, reported recently that film production by the majors was at an historic low. Thus, on top of several years of miserably low employment opportunities, these facts spell a worsening employment situation in the film industry. Payment of copyright fees means additional funds become available to bolster production and distribution.

Now, you are being told by cable interests that they comprise a special class; that all or a portion of the cable industry's revenues should be exempt from paying for the program material that is the first and prime essential of their operation.

Why should cable get a free ride?

Why should any user get rich at our expense?

All of us prate about our free enterprise system. Cable television is a privately owned free enterprise business. It doesn't give anything away free. It charges its subscribers a fee for the programs it sends to their homes. That fee ranges from as low as $4.50 a month to more than $20 a month. The national accepted average is about $6 a month. What does the projected copyright fee add to that cost?

Well, it is simple enough to compute the effect of the fee schedule in the pending bill, the so-called Gurney schedule. Assuming the average $6 a month cost to each cable subscriber, that copyright fee amounts to an average of 3¢ a month per subscriber or 36¢ a year! That's what we are talking about.

Yet some cable system owners have the effrontery to suggest that this fee would put them out of business or would be a serious burden to their subscribers. That, I suggest, Mr. Chairman, is poppycock. It should be nailed as blatant propaganda and I want to nail it. The fact is that the cable business is, in the main, an exceptionally lucrative business. Rates of return of small to medium

sized systems range as high as 50% or even more on the investment. Yet these are the people who cry wolf.

Indeed, even the original copyright fee schedule first promulgated by Senator McClellan was wholly inadequate, compared to the copyright fee paid for the same material by television station users. Now this copyright fee schedule is before us, sliced in half. If the Congress persists in enacting any fee schedule, it is imperative that the Royalty Tribunal be established and authorized to move ahead promptly with detailed studies to determine a fair and reasonable copyright fee for the cable business.

Frankly, we find it hard to understand why the Congress should get into the copyright rate-making arena. We much prefer Chairman Kastenmeier's original proposal eight years ago that left it to the market place—free negotiation between seller and buyer. It has worked fine for theaters and television. Why, all of a sudden, should Congress prescribe copyright fees in one special area.

I am afraid, Mr. Chairman, that I am taking a bit too much time. But I cannot over-emphasize the importance of this matter to our members. I repeat it is a bread and butter issue. We urge you strongly to make sure that a fair and reasonable return is derived from cable's use of the product we make in Hollywood and New York. I thank you for your courtesy and patience.

Member Organizations

The list of the member organizations of the Hollywood Film Council includes the three International unions, International Alliance of Theatrical Stage Employees, American Federation of Musicians, and L.A. Joint Executive Board of Hotel & Restaurant Employees and Bartenders Union, and the following guilds and craft unions:

- Affiliated Property Craftsmen, IATSE Local 44
- American Federation of Musicians Local 47
- Building Service Employees Local 278
- Composers and Lyricists Guild of America
- Costume Designers' Guild
- Dining Room and Cafeteria Employees Local 8
- International Photographers, IATSE Local 659
- Motion Picture Art Directors, IATSE Local 876
- Motion Picture Costumers, IATSE Local 705
- Motion Picture Film Editors, IATSE Local 776
- Motion Picture Screen Cartoonists, IATSE Local 839
- Motion Picture Studio Electrical Technicians, IATSE Local 728
- Motion Picture Studio Grips, IATSE Local 80
- Motion Picture Studio Projectionists, IATSE Local 165
- Motion Picture Studio Teachers and Welfare Workers, IATSE Local 884
- Office and Professional Employees O&PEIU Local 174
- Publicists Guild, IATSE Local 818
- Scenic Artists, IATSE Local 816
- Screen Actors Guild
- Screen Extras Guild
- Script Supervisors, IATSE Local 871
- Studio Transportation Drivers Local 399
- Studio Utility Employees, LIU Local 724
- Make-Up and Hair Stylists, IATSE Local 706

TESTIMONY OF WILLIAM K. HOWARD, PRESIDENT, HOLLYWOOD FILM COUNCIL

Mr. Howard. Thank you, Mr. Chairman.

Mr. Kastenmeier. You are welcome.

Mr. Howard. Mr. Chairman, and members of the subcommittee, my name is William K. Howard. My address is 1427 North La Brea Avenue in Hollywood, Calif. I am the president of the Hollywood Film Council, made up of the 27 largest craft unions and guilds in the motion picture industry. Their members are engaged in the production of films for theater, television, and cable viewing. Appended to my statement, which I will not take your time to read now, is a list of the craft unions and guilds for whom I am authorized to speak and

that are united in the Hollywood Film Council. These unions and guilds have a membership of some 60,000 men and women whose livelihood depends directly on the viability of the American film industry.

Mr. KASTENMEIER. Without objection, that list will be received and made a part of the record, as attached to your statement.

Mr. HOWARD. Thank you, Mr. Chairman.

I am here, Mr. Chairman, at the direction of the Film Council and its membership to express their deep concern on the question of the payment of copyright. I have been asked by Mr. Chester Migden, executive secretary of the Screen Actors Guild, to express his personal regret at his inability to be present today to speak for the Screen Actors. The officials of his guild are meeting in San Francisco today. We welcome this opportunity to express our views and are grateful to you and the members of the subcommittee for the opportunity to appear here.

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For the record, let me make it very clear that payments for the use of copyrighted materials in the film industry mean employment—jobs—for thousands of people. Payment for copyright means both jobs and more money for carpenters, painters, electricians, teamsters, cameramen, costumers, grips, projectionists, property men, and many others. In Mr. Migden's behalf, I speak also for the Hollywood creative guilds whose membership includes such creative people as actors, screen extras, film editors, musicians, writers, and directors. All are beneficiaries of copyright royalty payments.

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I am afraid, Mr. Chairman, that I am taking a bit too much time. But I cannot overemphasize the importance of this matter to our members. I repeat, it is a bread-and-butter issue. We urge you strongly to make sure that a fair and reasonable return is derived from cable's use of the product we make in Hollywood and New York.

I thank you for your courtesy and patience.

Mr. Kastenmeier. Thank you, Mr. Howard.

As a matter of fact, you were very, very brief and concise in your statement.

I take it none of your membership directly participates in copyright or copyright payment, but possibly some of Mr. Migden's people would—although, for the most part, their work is work for hire in terms of creative work, in terms of ownership of a copyright and the work of the film of itself; is that not correct?

Mr. Howard. This is partially true, except we do have a clause in many of the contracts that is called a supplemental market clause, by which certain payments for the reuse or the special use of a film would be paid into the workers' health and welfare pension fund. So, in effect, there is something in copyright that would help the people.

Mr. KASTENMEIER. In a nut shell, you are saying that the health of your industry very much reflects on the extent the employment and welfare, generally, of the 60,000 people employed in the industry that you represent; is that not correct?

Mr. HOWARD. Yes; and the added product is bound to help us.

Mr. KASTENMEIER. Do any of your membership work for any television industry or the cable television?

Mr. HOWARD. A number of our members work in the television industry, as such, for the networks and independent stations.

None of our guild or craft members are involved in the cable industry; possibly some technicians in other unions may be in parts production.

Mr. KASTENMEIER. Would they agree with you as well?

Mr. HOWARD. I feel they would, sir.

Mr. KASTENMEIER. I yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you very much, Mr. Chairman.

And Mr. Howard, pardon my ignorance, but would you explain to me the reference to the so-called Gurney schedule, on page 4.

Mr. HOWARD. Mr. Drinan, that information was furnished to me by the attorney for the Hollywood Film Council, and I believe Mr. Valenti could explain that much better than I could.

Mr. DRINAN. All right.

Now, you say that in general—I guess completely, you are behind what Mr. Valenti says. Then on page 5, you say, "We much prefer Chairman Kastenmeier's original proposal, rather than having the Royalty Tribunal." But Mr. Valenti, on page 32, seems to say that the Royalty Tribunal is almost necessary in view of the situation.

And when you say, "we much prefer," does that include Mr. Valenti and the industry in general?

Mr. HOWARD. Basically—I cannot speak for Mr. Valenti, but as far as the Film Council, yes, it does.

Mr. DRINAN. In other words, you would much prefer to have the law of the marketplace and not have a Royalty Tribunal to set fees for cable.

Mr. HOWARD. Primarily, we would not want to see cable go scot-free without some sort of set copyright fee on it. Which one would be the best, I am not sure.

Mr. DRINAN. Thank you very much.

Mr. KASTENMEIER. The chairman observes that the so-called Gurney schedule refers to the schedule, page 16, 111(c), subsection 2(b), presently in the bill: that half, as you point out, of the original schedule, appears to be the amendment of Senator Gurney.

The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Let me ask you a question that, I believe, was raised yesterday.

How do you respond to the argument that the network news or the television broadcasters take into account in their advertising expanded markets by reason of cable?

Mr. HOWARD. It is pretty hard for me to explain; in fact, I am not sure I understand the question completely.

We are in the field of cable television, primarily, are we not?

Mr. RAILSBACK. Primarily.

Let me just elaborate a little.

We were told yesterday, that in soliciting for advertising television stations would include reference to the cable television market. This enabled them to get more money from an advertiser by pointing out that the advertiser was not only reaching the local market, but was getting into an expanded market by reason of CATV.

Mr. HOWARD. Generally, the pure cable market, when you pay for a program or something like that, basically there is no advertising involved in that special program. You are referring to cable television that picks up a network and then puts it on cable for the individual?

Mr. RAILSBACK. No; I must not be making myself clear. What I am talking about is this: A copyright owner negotiates this sale, say, to a particular television station. That copyright owner, according to testimony that we heard yesterday, is in a position to actually negotiate for a higher price by reason of his knowledge that that television station, in selling that program, is going to be able to reach an expanded market by reason of cable. And they actually brought in yesterday some of their advertising material, which apparently did refer to this kind of an expanded market.

Mr. HOWARD. Mr. Railsback, I am afraid I am not qualified to answer that. I can answer anything about labor in Hollywood and unemployment, things like that; but——

Mr. RAILSBACK. That is fair enough.

Mr. KASTENMEIER. The gentleman from New York.

Mr. BADILLO. No questions.

Mr. KASTENMEIER. The gentleman from California.

Mr. WIGGINS. No questions.

Mr. KASTENMEIER. The gentleman from New York.

Mr. PATTISON. No questions.

Mr. KASTENMEIER. Thank you, Mr. Howard.

The Chair would like to call, on behalf of the motion picture industry, the president of the Motion Picture Association of America, Inc., and the Association of Motion Picture and Television Producers, Inc., Mr. Jack Valenti.

Mr. VALENTI. Thank you, Mr. Chairman.

Mr. KASTENMEIER. You have quite an extensive statement.

Mr. VALENTI. I will not impose on you, Mr. Chairman; I am going to extract from that statement, and extemporize a bit, and, hopefully, try to answer, in my extemporaneous remarks, some of the questions that were asked yesterday. And I will answer any questions you might have after that, if I have not fully explored the earlier questions.

Mr. KASTENMEIER. Without objection, your 64-page statement, including its addendum, will be accepted and made part of the record.

Mr. VALENTI. I would like to have that in the record, yes, sir.

[The prepared statement of Jack Valenti follows:]

STATEMENT OF JACK VALENTI, PRESIDENT OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., AND THE ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.

SUMMARY

This is what we believe:

1. Cable television should be liable for copyright.

It is a basic principle of United States copyright law that payment should be made for commercial use of a copyrighted work. Every profit-making business that uses copyrighted material in the United States ought to be liable for copyright.

2. Cable television should have no exemptions from copyright payments, measured by a portion of its subscribers, by a portion of its revenues, or in any other manner.

If the excuse is that it is an infant industry that requires nourishment, radio and television were once infant industries and Congress granted them no exemption from copyright.

3. Cable television should pay reasonable fees for the use of copyrighted program materials as provided by the original McClellan rate schedule.

(a) Smaller systems would pay modest royalties. A 500-subscriber system would pay $30 per month on annual revenues of $36,000; a 1,000-subscriber system would pay $60 a month on annual revenues of $72,000.

(b) Larger systems should not be subsidized at copyright owners' expense. Teleprompter, for example, has income running at an annual rate of some $90 million, and under one of the proposed exemptions, could avoid copyright payments on from $4 million to $7 million of its revenues.

4. Creation of a Royalty Tribunal is an essential part of a copyright bill.

Because the initial rate schedule in the bill was conceived without economic or fiscal facts or any experience, an impartial body should determine promptly and at periodic intervals thereafter what are fair and equitable payment rates for both the cable system and the copyright owner.

5. "Double payments" is a spurious contention.

It is a basic premise that separate payments should be made for multiple, commercial uses of copyrighted materials.

6. The Supreme Court has not exempted cable television from copyright liability.

The Court had to take the 1909 Act as it found it. It said that Congress had the responsibility of updating the law to deal with the communications changes that were not even conceived sixty years before, i.e., the Court left it to Congress to determine whether cable television should pay copyright.

7. Copyright royalty income directly affects the livelihood of those who work in the creative fields.

Unemployment, particularly in the film producing industry, is extremely high. Additional copyright income spurs production, offering increased employment to tens of thousands in the guilds and craft unions. The creative talents benefit directly from copyright income through "residuals."

8. That part of the definition of "secondary transmission" relating to non-simultaneous transmissions (the Stevens Amendment) is unnecessary, unwarranted, and legally imprudent. It should be deleted.

The amendment would permit cable television systems in certain areas outside the continental United States to tape television programs for later showings on cable to the harm of the local television stations in those areas, and to the detriment of the owner of the copyrighted program so used.

9. The criminal penalties for piracy and false labeling should be increased in the copyright law to make such crimes felonies.

The Department of Justice has pointed out that pirating of copyrighted works has become a serious and major problem. Our own industry has suffered tremendous losses and has created a special policing department. Privacy should be made a felony for the first offense as in other "economic" crimes such as violation of the antitrust laws.

I. INTRODUCTION

My name is Jack Valenti. I am President of, and representing here today, the Motion Picture Association of America, whose headquarters are in Washington, and the Association of Motion Picture and Television Producers, Inc., located in Hollywood. MPAA is a trade association, whose membership includes the largest American producers and distributors of copyrighted motion pictures. AMPTP is a California membership corporation composed of 72 companies that produce copyrighted motion pictures for theatrical exhibition and for television viewing, and series programs for telecasting. Additionally, I speak also for a third organization, the Committee of Copyright Owners, or CCO. This group is an ad hoc committee of independent producers and distributors of filmed and taped copyrighted television programs, formed to coordinate their efforts in resolving the copyright-cable television issue and the various regulatory issues that arise from time to time over the importation of television signals by cable. A list of the membership of each of the three organizations I speak for is included as part VII of this statement.

Also I am pleased to note that the motion picture industry does not stand here alone. Broadcast licensees, both radio and television as represented by the NAB, music and book publishers, authors and many other organizations and individuals are all making the same case, enactment of a fair copyright law.

I appreciate the opportunity to appear before this Subcommittee. Primarily, my remarks today are directed to the issue of copyright liability of cable television systems and the provisions of H.R. 2223 which affect this liability. These include the royalty rate schedule, the Copyright Tribunal, and other provisions relating to the copyright liability of cable. Several other issues also are of substantial importance to our member companies, and I will discuss them briefly later in my statement.

The members of this subcommittee are generally aware, I am sure, of the historical background of copyright liability of cable television under the present 1909 Copyright Act and the many efforts over the last ten or more years to resolve the issue. Cable television is not now liable for copyright. That is the basic problem. Cable television operates in an environment where every other user of copyrighted programs bargains and pays for its use. Television stations, theaters, phonographic record, video cassette and sound tape manufacturers, all must pay license fees which have become a normal item of their cost of doing business.

The involved parties themselves sought to resolve the issue of cable's liability in an undertaking known as the Consensus Agreement, which had the blessing of the Federal Communications Commission and with the White House Office of Telecommunications Policy. The Congress too has had a hand in dealing with the problem by passing a Copyright Bill in this House some years ago and last year in the Senate. Cable walked away from this agreement and subsequent understandings.

A more detailed discussion of the background and the efforts to resolve this issue is included as part V of this statement. I see no reason to take your valuable time now to recite this past. Rather, I think it more beneficial to discuss the issues, and the position and the reasons for the position taken by copyright proprietors.

The organizations I represent here today strongly believe in and urge you to approve a copyright bill that will require cable television to pay copyright royalties. We ask only for royalties that are reasonable and just—fair for cable as well as for copyright owners. In making this point, we do so not as an opponent of cable. On the contrary, despite cable's repudiation of its agreements and our disappointments in dealing with cable operators, we look upon cable television as an ultimately significant additional user of our product. That is why we have supported cable television, especially "Family Choice Cable" (i.e., pay cable), so strongly before the Federal Communications Commission. But our support of cable television does not mean we believe it should get a free ride at our expense over the conventional television industry, an industry which has paid copyright royalties from its very beginning.

II. CABLE TELEVISION, AS A PRIVATE, PROFITMAKING BUSINESS, SHOULD PAY COPYRIGHT FEES AS DO OTHER MEDIA WITH WHICH IT COMPETES

A. *Why Cable Television Should Pay Copyright*

Under article I, section 8, of the Constitution, the sanctity of copyright is affirmatively recognized. It is a means of promoting the American arts and sciences. As the Register of Copyrights so well explained in a letter to Senator John McClellan last year:

> The Constitution directs Congress to legislate to secure to authors exclusive rights in their writings. Reward to the author and his legal successors is essential to stimulate creativity. We are all enriched by this creativity. It is surely not too much to expect that some payment to copyright proprietors will be made for commercial uses of copyrighted works.

Or as the Supreme Court has formulated the reason for copyright:

> The economic philosophy behind the (constitutional) clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered. (Mazer v. Stein, 347 U.S. 201, 219, 1954)

The right of copyright should not be sacrificed to every other right—nor should it ever be sacrificed to economic or technological expediency. To quote again the Register of Copyrights: "The basic human rights of individual authors throughout the world are being sacrificed more and more on the altar of . . . the technological revolution."

In short, the right of copyright and the protection of copyright has been declared by our Constitution to be in the public interest. Conversely special interest groups seeking to take a free ride on the creativity and investments of others have been never so recognized by the Constitution.

No justifiable reason exists for violating this policy, except that the archaic and obsolete 1909 law did not foresee the technology of the new medium. Other private enterprises in this country that use copyrighted material pay for it, including all the other communications media. For example, in April, 1975, there were 8,821 radio and television stations, and each time one of those stations used a copyrighted work, it was required to pay a copyright royalty. May I remind you that the radio and television industries were "infant" industries once. But they had no compulsory licenses when they were growing into the giants they are today. The payment of a reasonable copyright fee did not hinder their growth or their prosperity.

Even non-profit organizations such as educational television stations bargain and pay for copyright licenses when they use copyrighted entertainment programs. An amateur actors' group or a high school class which engages in the public performance of a copyrighted play, or which has a public screening of a film, pays a royalty.

The cable television industry is a private business run for private profit. Yet it pays no copyright. To exempt cable television from copyright liability would create an anomaly without reason. Such an exemption would be contrary to the policy of our copyright laws; it would confer a special privilege. It would confer this privilege by allowing a privately-owned, for-profit industry to use the one essential element of its operation—program material—free of any cost. Moreover, in so doing, the Congress would be taking private property from its owners and giving it to others. Clearly, there can be no public interest justification for exempting cable from copyright payment.

Cable television competes with television for viewers. To do this, cable uses sophisticated equipment and facilities to provide improved signals to its cable viewers. In the early days of cable television, a cable system might have been fairly considered just an enlarged antenna system. A major antenna was placed on a hill top and wires were strung from the antenna to homes to receive the augmented television signals. But cable has not been an antenna system for some years now.

Cable television does far more than receive signals. It imports many distant signals by means of expensive and highly technical microwave installations; it amplifies all signals; changes their channel, distributes them, and makes a charge for them. This dissemination of signals requires the use of highly sophisticated equipment and machinery, skilled personnel, and buildings and grounds. Moreover, cable systems not only distribute television signals, but perform other services. By using television programs as building blocks, the cable systems can and do provide pay cable or family choice cable. As suppliers of program material, we welcome this proliferation of cable service; we ask only that we be paid for what they use.

The function of cable today was probably never stated better or more clearly than by an officer of the cable trade association. Mr. Edward Allen, a director of the National Cable Television Association (NCTA) and President of Western Communications, Inc., a cable network of 63,000 subscribers, declared this past April:

> We do receive those (television) broadcast signals at our headends. However, nobody watches our signals at our headends. After we receive these broadcast signals we process them, we amplify them, we distribute them, and then we make a charge for them, and anybody who has ever been through a power outage or through a station outage knows that even the most sophisticated headend receiving equipment and distribution system are absolutely worthless unless we have those signals running through our cables. What we do to these signals after we receive them, to my mind, does in fact constitute a performance for profit.

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Cable television does something else to attract viewers away from local television stations. It imports signals—programs—from distant television stations to its cable subscribers in its own local market. Thus, cable television is not only using local signals free of any cost, but by importing distant signals free of charge it fragments the market of the local television station with which it is competing for audience. In so doing, it not only competes unfairly with the television station that must pay for its programming, but it destroys, or at the very least impairs the copyright owner's ability to sell his product to the television station in that market. In short, if cable television is not subject to copyright liability, the Congress would not only be giving cable a free ride, but it would, in effect, be subsidizing cable at our expense and to our subsequent economic disadvantage. In so doing the Congress would legitimatize unfair competition against television—an unsubsidized free market enterprise.

Finally, cable television copyright liability has been recognized by many organizations. The official body of cable, NCTA, in testimony before the Senate Subcommittee on Copyright, on August 1, 1973, and again in a public statement this May, confirmed its commitment to copyright liability.

The present Chairman of the FCC and the acting director of the Office of Telecommunications Policy have publicly voiced their support in favor of copyright liability. The 1974 Report to the President by the Cabinet Committee on Cable Communications recommended that cable television pay copyright. That report said, "Both equity and the incentives necessary for the free and competitive supply of programs require a system in which program retailers using cable channels negotiate and pay for the right to use programs and other copyrighted information." A more recent report by a special committee of the Committee for Economic Development called for copyright payments by cable television.

Finally, it should be noted that since the 1940's, international law under the Berne Convention has imposed copyright liability on the retransmission of radio programs by wire. The great concern uniformly expressed for the protection of copyright as a property right throughout Europe suggests that court decisions will hold that cable television is liable for copyright. Indeed, when Japan enacted a new copyright law, it believed that copyright liability on cable was necessary to conform to the terms of the Convention. We believe that in keeping with the probability of United States accession to the Convention following enactment of this bill, copyright liabiltiy for cable should be imposed.

In summary, Mr. Chairman, constitutional recognition, legislative policy, business practices under the free enterprise system, and plain logic demand that cable television should pay copyright royalty.

B. *Copyright Royalties Increase Employment and Income in the Motion Picture Industry*

I want to touch only briefly on this point. Mr. William K. Howard, President of the Hollywood Film Council representing the labor unions and guilds of the United States film industry, will deal more fully with the importance of copyright income to the men and women in the craft unions and guilds in California and New York who make motion pictures and television films.

The diversion of audiences from television to cable results in reducing the income of the film industry. It affects not only the producers and distributors of motion pictures who hold copyrights in the films, but also the tens of thousands of persons throughout the industry who contribute to the creation of motion pictures. Their rights depend on the right of copyright owners to be paid for the commercial use of copyrighted films by cable. The compensation of many of the creative talents such as the screen writers, directors, composers and actors, depends to a large extent, on their income from "residuals", i.e., on payments under collective bargaining agreements for each showing ("run") of the film subsequent to its original telecast. To the extent that any such showing on a television station which would pay a license fee to the copyright owner is replaced by an importation of the same program by cable, which does not pay a license fee, the talents of the creative segment of the industry will go unrewarded.

Royalty payments by cable television would help in recouping the cost of films and spur greater investment in the production of motion pictures. Additional copyright income means more jobs in an area of gravely high unemployment.

C. *Copyright Royalty Fees Paid by Cable Television Should Be Reasonable and Just*

The question then is, not whether cable should pay copyright royalties, but rather: "How much should cable pay and how do you determine what is fair payment?" I repeat again: We ask only that we be treated fairly, and that cable be required to pay just and reasonable fees.

What is just and reasonable? Differences of opinion exist on that issue. We have no marketplace experience for what is fair for us and reasonable for cable. There is, however, considerable experience in other areas.

Let us look briefly at what television pays for copyrighted program material. We have obtained official figures from the Federal Communications Commission on copyright costs for networks, and for affiliated stations, for independent television stations, and average costs for all television stations.

In 1973, the latest data available, the television industry paid out slightly more than 25 percent of its entire gross revenue of almost $4 billion for copyrighted material. Compare this with the 5 percent highest rate specified in the original McClellan rate schedule for cable systems. Compare this with the average cost, under that same schedule, for 70 percent of all cable systems of the equivalent of 6¢ a subscriber each month or 1 percent of subscriber revenues. Even more striking is a comparison under the schedule contained in H.R. 2223, which would require 70 percent of the systems to pay only 3¢ a month per subscriber or ½ of one percent of system revenues.

Furthermore, it should be kept in mind that the top rate does not apply to all revenues of a cable system but only to its revenues in the top bracket, i.e., revenues in excess of $160,000 a quarter or $640,000 annually. Therefore, the actual effective rate that any system would pay would be much lower than its applicable percentage rate specified in the fee schedule.

I cite these figures not as direct measuring sticks for what cable should pay for copyright, nor as an invidious comparison with the royalty rate schedule proposed in the bill. Rather, they serve to emphasize that copyrighted programming material is a major and expensive factor in television operation. What is significant here, I believe, is how modest, how low is the proposed cost of this copyrighted material to cable systems in the United States.

The rate schedule in H.R. 2223 would impose on each cable system an average cost of 6¢ per month for each of its subscribers. The original McClellan rate schedule provided for copyright royalties ranging from 1 percent to 5 percent of gross subscriber revenues. That rate would bring the average cost each month to each cable system to about 12¢ per subscriber. Either figure—6¢ or 12¢ per month—is hardly inflationary, unjust, or unreasonable to a cable system. Indeed, it needs to be emphasized that a cable system pays more in mailing the subscriber his monthly bill than it would pay for copyright under either H.R. 2223 or the original McClellan fee schedule.

It is a fact that the original McClellan rate schedule was not premised on either statistical or economic data. But it is also a fact, an undeniable fact, that this fee schedule rooted neither in economics nor marketplace data, was arbitrarily cut in half during final Senate committee consideration. This is the schedule now contained in H.R. 2223. Based on what others pay for copyright, notably television, and the small cost to cable systems, copyright owners believed—and still believe—that the original McClellan rates were low and the rates in the bill now pending are absurdly low. In retrospect, calculated on the cost per subscriber to the cable system—an average of 12¢ a month or $1.44 a year—it is hard to understand how the original McClellan royalty rate is unjust or unreasonable to the cable system owner. This Subcommittee should therefore amend the bill and adopt the McClellan schedule providing for rates ranging from 1 percent to 5 percent of subscriber revenues.

The controversy over the two rate schedules emphasizes the importance of how rates are to be adjusted after an initial rate schedule is enacted into law.

One alternative proposed by NCTA and others is to freeze this initial rate schedule and provide for adjustment only by further act of Congress. As a practical matter, this means there will be no change in rates. We have only had four copyright laws in the almost 200 year history of our country, and, as the Members of this Subcommittee are well aware, the present law is 66 years old. With this as a precedent, program suppliers of copyrighted materials and the operators of cable systems would be saddled for years with a rate schedule arbitrarily determined without any economic data or facts to give it substance. Such an approach does not allow for changing economic conditions in a dynamic industry and is manifestly unjust to both parties.

The second alternative is the one included in H.R. 2223: the establishment of a Royalty Tribunal that would adjust the royalty rate schedule periodically based on expertise and factual economic and market information. This is acceptable to us, *if* H.R. 2223 also provides that the Tribunal is required:

(1) To meet initially as soon as practicable on a day certain and issue a decision on whether the rate schedule should be revised, and if so, what the new rates should be; and

(2) To meet and consider fee revisions at least once every 5 years.

Periodic review is obviously necessary since that is the purpose of the Tribunal. An initial decision of the Tribunal at an early date is essential since the statutory rate schedule will be an arbitrary one, and none of the parties affected by it should have to live with those arbitrary rates longer than is absolutely required.

This alternative is consistent with the recommendations of the previously mentioned study of the special committee of the Committee for Economic Development which stated:

> Determining just compensation for a creative product distributed by cable has been extremely difficult. More precise economic studies are required in order to fix reasonable fee scales. In the absence of such information, however, the parties concerned should jointly establish a schedule of royalty payments, and Congress could provide for compulsory arbitration if agreement between the parties cannot be reached.

III. TRUTHS ABOUT COPYRIGHT WHICH REFUTE FALSE CABLE ARGUMENTS

A. *The Supreme Court Has Not Exempted Cable Television From Copyright Liability*

I would like to deal briefly with a shibboleth that has been given wide currency. It is that the Supreme Court has exempted cable systems from all copyright liability. That claim is not correct. The Supreme Court held only that cable systems were not liable for copyright infringement under the 1909 Copyright Act. This is a law, now 66 years old, enacted when communications as we know it today did not exist. (See *Fortnightly Corp.* v. *United Artists Television,* 392 U.S. 390, 1968, and *Teleprompter Corp.* v. *Columbia Broadcasting System,* 415 U.S. 394, 1974).

The Court pointed out in the *Fortnightly* decision that it was faced with the duty of interpreting a statute, "in the light of drastic technological change, . . ." (at p. 396). The Court specifically rejected an invitation of the Solicitor General to render a compromise decision that would accommodate various interests, since it said that this "job is for Congress." The Court had to take the 1909 Act as it found it (p. 401). Later in its *Teleprompter* decision, the Court reaffirmed its position that updating the copyright laws was a matter for Congress to deal with. It said:

> These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be *controlled by means of litigation* based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, *must be left to Congress.* (Teleprompter, at p. 414. Footnote omitted. Emphasis added.)

In short, the Court left it to Congress to construct a new copyright law which would take into account new and dazzling technological innovations.

B. *Copyright Owners Would Not Receive "Double Payment" if Cable Television Pays Royalties*

Cable television operators frequently contend that television stations already have paid copyright royalties for cable viewers. Television broadcasters, they assert, and through them, program suppliers such as our motion picture producers and distributors, have been paid by advertisers who recognize the added coverage of cable viewers. The contention is that by seeking copyright payment from cable, we are seeking to be paid twice.

Let's assume, for the sake of argument, that television advertisers do pay for cable subscribers, an assumption which is not valid. The payment of copyright is a constitutionally recognized right. Copyright law fosters this right so that commercial users of copyrighted materials pay for that use. The potential and incentive to create artistic works is enhanced and each user bears part of the cost of promoting the arts.

The plain fact is that the compensation of the creator of a copyrighted work is frequently derived from more than one source and payment of separate license fees for separate commercial uses of the same copyrighted work is fully consistent with copyright policy. Thus, the writer of a novel may be collecting royalties from the publisher of the hard cover edition of his book, the publisher of the soft cover edition, the periodical which serializes it, the producer which stages it in a legitimate theater, the motion picture company which produces a motion

picture based on the novel, another motion picture company which acquires the remake right for another motion picture and from sundry other users of all or part of the work.

Multiple uses of copyrighted works have traditionally led to the payment of separate royalties for each profit-making use. Thus, as Dr. Leland Johnson explains in *The Future of Cable Television* (1970), an in-depth economic study prepared in 1970 by the Rand Corporation:

> * * * the fact that a movie is produced primarily for the theatre market and supported by paid admissions does not suggest that television stations supported by advertising revenues should have free access to those movies. Nor does the production of programming primarily for the advertiser-supported broadcast market suggest that cable systems supported by subscribers should have free access to that programming. (p. 27)

It is clear that the contention that double payment takes place because one user (television in this case) has already paid copyright is a spurious and irrelevant argument which violates the very basis for the constitutional right.

It is an argument which I am sure will find no haven with those trained in the law. Television stations and networks are not exempt from paying copyright nor do they claim to be exempt, because theater owners have already paid to show feature films. For that matter, no such claim is made by Family Choice Cable (i.e., pay cable) operators. There is no legal reason to treat cable television, using off-the-air signals, any differently.

How accurate, in any event, is the claim of double payment? I submit it has no validity at all.

Suppose a CBS television station affiliate carries a program which it licenses from a copyright owner for telecasting. And suppose that the NBC affiliate in the same city decides that this would be a good program to build up its own audience and snatches that program from the air and retransmits it over its own facilities. This NBC station could argue, by the same reasoning as some cable advocates do, that because it would simply retransmit a local signal for which the copyright owner was paid, it should have the right to do this without a license or payment of separate royalties. Thus, just as the copyright bill requires a television station to acquire a license for a network television retransmission, so it should require payment of a royalty under the compulsory license even where local signals are transmitted by cable to its subscribers, especially because the cable system, unlike a television station, collects fees from its subscribers.

Rating services for advertisers carefully measure markets where advertising is expected to have maximum impact. Advertisers are not willing to pay duplicate coverage within a market or for audiences outside such markets.

Another and more important problem concerns distant signals. Operators of cable systems import distant signals. When the programs retransmitted by the cable system are imported from distant stations, the copyright owner's opportunity to sell the same program to a local station in the invaded market is severely impaired. To make this point clear, I want to outline briefly the way the television market works:

Because of certain electrical and physical limitations and regulatory restrictions imposed on a television station's power and antenna height, effective reception of the station's signals is limited to a determinable geographic area. As the result of such reception conditions, this area becomes the "market" which is serviced by the station's programs and commercials, and for which the telecasting of programs is licensed by the copyright owners.

Each time a program is exhibited in a market, the audience potential for the next showing of the program in that market is diminished.

Few television viewers in an area would tune in again to see a motion picture which has already been imported into that area by a cable system, perhaps only a few days prior to the showing by the local television station.

When a cable system imports a program from a distant station, it scoops up part of the potential audience for that program in the market where the cable system operates. The result is that the local station will pay only a reduced license fee, if it is willing to take a license at all, for a program which has already been shown in its market.

Nor would the station whose signals are carried by cable television into distant markets pay the copyright owner additional monies for the enlarged audience. A station's revenues, hence the price which it is able to pay to the copyright owner for a license to broadcast a copyrighted work, depends on the size of the audience within the station's market but not on any audience *outside* of that station's market.

The reason why an audience outside of the station's market is of little value to the originating station is that local commercials retransmitted to the distant audiences are of no value to the advertiser. Thus a used car dealer or furniture store in Chicago would not pay a penny more for bringing his commercials on a Chicago station to audiences in Dubuque, Iowa.

The net economic result of permitting the importation of programs from distant stations without copyright licensing has been well described by Dr. Leland Johnson of the Rand Corporation in his 1970 study, *Cable Television and the Question of Protecting Local Broadcasting:*

> Because local audience is generally more valuable (to advertisers) than is the more distant audience, the financial costs of audience lost to the local station are likely to outweigh the gains to the distant station—implying a net reduction in financial resources available for programming. Under these circumstances * * * the benefit of cable growth might well lie largely in providing the public with more channels of worse stuff. (p. 21)

Some cable operators are urging that the bill should draw a distinction between distant and local signals. They argue for payment of royalties for programs retransmitted from distant stations. They would, however, exempt the retransmission of broadcasts from local stations.

H.R. 2223 provides for a total royalty based on the cable system's revenues from the basic service of transmitting broadcast signals. It does not distinguish between payment for distant and local signals for what, we believe, are very sound reasons. Technological innovation is causing constant changes in the cable television field. What may be considered a local or distant signal today may not be considered the same kind of signal tomorrow. For that matter, *all* signals may become "local" or "distant" tomorrow. Because of this fluid situation, neither the initial fee schedule nor the Royalty Tribunal should be tied to any artificial "local-distant" signal distinction. If a panel of the Tribunal determines that such a distinction should be considered in setting a fee schedule for a five-year period, then it may. But that distinction would not be locked into law, since a subsequent panel may give the distinction different weight.

NCTA publicly reaffirmed this past May 23rd that it favored the payment of royalties for local signals because it would result in a more equitable distribution of the total industry burden among metropolitan and small town systems. There are large and prosperous cable systems operating in the big cities with many local television stations so that the cable systems in these markets import relatively few distant signals and, therefore, importations play a minor part in the total operation and profitability of these systems.

On the other hand, there are many relatively small cable systems operating in areas where there are few, if any, local stations so that the importation of distant signals constitutes the major service which these systems render to their subscribers. It would not be fair to let these small systems in the remote areas—which render a service where few over-the-air programs are available—pay all of the contribution which the cable industry will make to help finance the production of programs; and it would be equally unfair to free from such burden the large metropolitan systems which use primarily local signals.

C. *Copyright Payments Will Not Destroy the Cable Industry*

No one is out to destroy the cable industry. On the contrary, copyright owners see it as another customer for their product. But cable television is part of the free enterprise system. Its goal is to make a profit; that is the goal of television and the goal of copyright owners.

There is no justification to excuse the cable industry from paying copyright in the same manner as any other communications medium must. No other communications medium had an exemption from copyright while it was growing, or at any other time and cable should not be treated any differently.

The real effect, the end result of cable television's argument stripped of rhetoric, is that the cable industry should be subsidized. The subsidy would be in the form of a statutory exemption of copyright royalty payments—a subsidy by another private industry, the copyright owners.

Cable television should be required to meet copyright costs as one of its ongoing expenses. Copyright fees are as essential an ordinary business expense for a cable system as are its costs for head-end equipment, the cables it installs, the electricity it buys from the local utility to energize the equipment and the rental of poles from utility companies over which it strings its cable.

It is absurd to claim that royalty payments for programs—the most essential produce cable needs—are the straw that puts a cable system out of business. The

facts are otherwise. The original McClellan rate schedule would be a minor cost item for cable systems. It is arbitrarily low. Cable systems spend more than the proposed royalty payments in their campaign to oppose any copyright liability and appear to bear that burden without travail.

One of the scare arguments advanced by cable operators is that the payment of copyright fees would increase the subscription fees which the public would have to pay for cable television service. Indeed, some have described it as a "new tax" that would be imposed on their subscribers. As I have pointed out, the impact of the payment of copyright fees by cable operators on their total revenues is, to say the least, of minor consequence compared to a system's revenues or other operating costs.

On the other hand, it is noteworthy that during the last few years, cable operators have secured substantial increases in their subscriber fees although they have not paid a cent for copyright fees. In this connection I would like to direct the Subcommittee's attention to the 1974 Annual Report of Teleprompter Corporation, one of the leading multiple system owners. Teleprompter proudly proclaimed its rate increase program as follows:

> In 1974 Teleprompter secured rate increases in 84 systems affecting approximately 777,000 subscribers—a task which required the approval of over 200 municipalities. These rate increases added more than $6,000,000 to 1974 revenues and, based on the current level of subscribers, will increase 1975 revenues by approximately $14,600,000. Teleprompter is continuing to seek rate increases in 1975, including rate increases in certain systems in which rate increases were obtained in 1973 or 1974. (p. 5)

D. *This Copyright Bill Should Not Prohibit the FCC From Imposing Nonduplication or Exclusivity Rules in Accordance With Its Jurisdiction and Responsibilities*

I understand that cable interests are urging the insertion into the bill of provisions directing the FCC to eliminate the nonduplication and exclusivity rules adopted by it in the Cable Television Report and Order of 1972 in accordance with the provisions of the Consensus Agreement. It seems to me to be highly inappropriate for a copyright statute to issue directions to the FCC encroaching upon its authority to issue regulations under the Communications Act.

The signals cable television should be required to carry, and the signals cable should be prohibited from carrying, are regulatory matters within the jurisdiction of the Federal Communications Commission. These determinations require careful consideration and detailed balancing of many factors. Congress established the Commission to carry out just such types of functions. H.R. 2223 is not a bill to decide communications and broadcast regulatory issues. Congress should not bog this bill down with regulatory determinations.

Moreover, provisions relating to FCC jurisdiction are outside the aegis of this Committee. During the past decade of congressional consideration of copyright revision bills, provision after provision dealing with communications regulations has been stricken as being neither germane to a copyright bill nor within the purview of the Judiciary Committee. A request to include a regulatory provision at this stage is only a thinly disguised attempt by cable interests to have the copyright bill referred to another committee with the purpose of delaying or defeating its enactment.

E. *The Royalty Tribunal Is a Body Organized To Carry Out Important Functions and Is Not Another Useless Bureaucracy*

Cable television operators also often claim that the establishment of the Royalty Tribunal creates another government bureaucracy, and the American public does not need another bureaucracy. If cable operators mean by this argument that they prefer elimination of the compulsory license and cable would negotiate for every program it carries, we approve. We are willing at any time to accept a proposal from cable that it should pay copyright based upon free and open negotiation.

However, in my view cable operators use this argument as an excuse to saddle copyright owners with a completely arbitrary rate schedule, engraved in stone by statute, never to be revised again except by law—maybe another 66 years from now. There is no denial that the original McClellan rate schedule was arbitrary, and that it was thereafter arbitrarily cut in half in H.R. 2223. There is no denial that Congress has neither the time nor the expertise to determine a fair rate schedule. Therefore, *if equity is to be done for both parties, Congress must either*

provide for privately negotiated licenses or a fair and impartial arbitration tribunal to adjust rates periodically.

Moreover, the Copyright Royalty Tribunal is not one specially organized to review only cable system royalties. It was established in the copyright bill also to review the adjustment of royalty rates for phonorecords (see sections 801(b) and 802(a)) and for the distribution of royalty fees deposited pursuant to sections 111 (cable television) and 116 (phonorecords). In other words, the Copyright Royalty Tribunal will be needed whether cable royalties are frozen into the statute or not.

F. *The Definition of "Cable System" for the Purpose of Computing Royalties Should Not Be Changed*

Cable interests also urge that the definition of cable system as contained in section 111 (e) of the bill be changed to make it conform to the general definition contained in the FCC's rules (section 76.5(a)). That rule prescribes that each separate and distinct community or municipal entity served by cable television systems, constitutes a separate television system, even if there is a single headend and identical ownership of facilities extending into several communities.

However, in a number of areas dealing with cable television the FCC itself has modified this definition. The FCC has qualified the cable system definition so that it more nearly follows the thrust of the language in H.R. 2223. Even the Commission has recognized, as does this bill, that a definition of cable systems based on the boundaries of a political subdivision is artificial.

Moreover, the application of the unmodified definition of section 76.5(a) of the FCC rules to the computation of royalties would be grossly unfair to copyright owners. It would allow technically and economically integrated systems to split themselves artificially into several smaller systems and permit these large systems to pay copyright fees under the progressive percentage scale at the low rate reserved for smaller systems. If the royalty computation were to be based on this definition, the revenues of individual cable systems would be fragmented to such an extent that they could well halve the effective rate under the sliding scale of section 111.

IV. PROPOSED AMENDMENTS TO H.R. 2223

I turn now, Mr. Chairman, to a brief discussion of a number of amendments that we strongly urge be made in the bill. I will supply for the record in part VI of this statement, specific amendatory language to cover these proposals.

A. *Delete the "Stevens" Amendment*

Let me talk first about what became known in the Senate as the "Stevens Amendment," originally proposed by Senator Stevens to meet a problem in Alaska, a problem that happily has now been solved and no longer exists. The Stevens Amendment will be found on page 17, beginning on line 29, of the bill. It is a re-definition of a "secondary transmission." It says that the taping of a primary transmission shall be deemed a secondary transmission in certain circumstances and under certain conditions.

Let me explain.

Under section 111, all cable systems would have a statutory license to carry and retransmit those television signals permitted "under the rules, regulations, or authorizations of the Federal Communications Commission" (section 111(c)(1)(c)). For all cable systems, whether located in the 48 states or in the offshore areas, the statutory license applies to the simultaneous retransmission of television signals received off-the-air.

The Stevens Amendment, however, gives special permission to cable systems in Alaska, the Virgin Islands, Guam, or other U.S. possessions, and, under more limited circumstances, to cable systems in Hawaii, to tape programs on the mainland and to retransmit them nonsimultaneously to their subscribers. In addition, language proposed by the Delegate of Guam, and now pending before this Subcommittee (H.R. 4965), would go further and give taping rights to all offshore states, territories, commonwealths, and possessions of the United States.

By giving statutory permission to tape and record programs, the Congress would be authorizing the physical creation of copies of the copyright owner's work. These copies could easily become the basis for large-scale trading in pirated television programs. The motion picture industry has had a long and continuing struggle to eliminate any trade in or circulation of pirated prints of feature films. Both the Amendment and H.R. 4965, however, would place into the stream of commerce the very kinds of copies and tapes which the industry

has so strenuously tried to eliminate. In addition, it might also encourage cable systems in foreign countries (e.g., Canada) to engage in similar practices on the theory that they should be subject to no greater limitations than apply to cable systems outside the 48 contiguous states.

The Stevens Amendment and H.R. 4965 are in direct contradiction to the philosophy of copyright protection. This view is emphasized by the Register of Copyrights in a recent general review of and comments on the copyright revision bill requested last year by your Committee's Chairman, the Honorable Peter Rodino. The Register wrote:

> The definition of "secondary transmission" has been revised to include nonsimultaneous carriage by a cable system located outside the boundary of the 48 continguous states. This change is related to a new definition of "cable system," which is broadened to permit cable operators located outside the contiguous 48 states to be regarded as one system, even though the secondary transmissions are nonsimultaneous with the primary transmissions. Recognizing the concerns that led to these changes, we have serious reservations about their advisability.

Adoption of the Stevens Amendment for the benefit of Alaska was asserted to be justified on the grounds that some cable systems were located in communities too remote from any television station for reception of their signals off-the-air and for the further reason that, unlike in the continental United States, no microwave service existed which could have transmitted these signals.

This potential problem, however, was solved subsequent to the adoption of the Stevens Amendment in the Senate when copyright owners issued special blanket licenses to cable systems located in these remote areas enabling them to serve their Alaskan viewers. The agreement, formally approved by the Federal District Court, is entirely satisfactory to the involved Alaskan operators, who have so informed Senator Stevens, and to our members who represent about 80 percent of copyright programming used by television and cable.

Clearly, therefore, the Stevens Amendment has lost its usefulness for Alaska and serves no purpose.

A similar license arrangement can and would be made for the Guam cable system, if it so desires. Consequently, there is also no need for special statutory language for Guam, and no case has been presented for adopting special statutory language for other American territories and possessions.

It is neither necessary nor desirable for such an offshore location as Hawaii to be covered by this Amendment. It simply has no rational base. There is a full complement of television stations in Hawaii to provide more than enough programming for the island cable systems to pick up for their subscribers. Indeed, the situation in Hawaii is the same as it is in the continental United States where the taping of programs by cable systems is prohibited for good and sufficient reason. So long as there are an adequate number of television stations whose signals can be picked up by cable systems and retransmitted simultaneously, there are no economic, social, or legal reasons why cable systems in Hawaii should be treated any differently than cable systems in the continental United States.

It is clear, we believe, that the Stevens Amendment and H.R. 4965 are unnecessary, unwarranted by the facts, and legally imprudent. *We ask that the Amendment be deleted from H.R. 2223 and that H.R. 4965 not be considered.* The specific language to delete the Stevens Amendment is included in part VI of this statement.

B. *Increasing the Initial Fee Schedule*

I believe the record gives ample support why the original McClellan rate schedule should be included in H.R. 2223. We therefore recommend that the initial rate schedule require cable systems to pay from 1 percent to 5 percent of their subscriber revenues as copyright royalty.

C. *Administrative Provisions Relating to the Royalty Tribunal*

As a result of the need for prompt Tribunal action, the first public notice for reviewing the section 111 royalty schedule should be changed from July 1, 1977, to January 1, 1977. The Tribunal staff will have been previously appointed shortly after the enactment of the bill and will have had a year to assemble data and information. Succeeding staffs and panels of the Tribunal will have available this background. No reason exists why one year is needed for the Tribunal to reach an initial decision. *We therefore recommend that the Tribunal*

be required to reach a decision within 90 days, except that upon certification by the panel that it needs additional time, the panel will have a maximum of an additional 90 days to reach a decision.

As a result of the change in time for convening a panel of the Tribunal to review the first cable rate schedule and the change for timely periodic review, the dates of the subsequent reviews should likewise be changed. *We recommend that subsequent rate review be commenced in 1982 and every fifth year thereafter.*

The bill does not specify when the facilities and staffing of the Tribunal should first be provided. Due to the importance of reviewing as quickly as possible the arbitrary section 111 statutory rate schedule, *we recommend that the Library of Congress be directed to provide staff and facilities within 60 days of enactment of H.R. 2223.*

Because members serving on panels of the Tribunal are not permanent, full-time employees of the United States, *a clarifying provision should be adopted that members of a panel are to be paid compensation only for each day (including travel time) they are performing their duties as members of the Tribunal.*

H.R. 2223 presently provides that facilities and incidental services are to be provided by the Library of Congress, while temporary and intermittent employees are to be appointed by the Tribunal. *Since the Tribunal is in fact a series of three-member panels, administratively it would be beneficial to provide that the Library should provide all facilities, services, and personnel.*

D. *Clarification of Cable Ownership Notice Requirement*

Section 111(d)(1) of H.R. 2223 provides that each cable system must file with the Copyright Office within 30 days of enactment of the bill or before commencing transmissions (whichever is later), a notice of ownership or control. It is logical that *this section should also require such a notice whenever the ownership or control of a cable system changes. We recommend that such a clarifying amendment be adopted.*

E. *Criminal Penalties for Piracy and False Labeling*

The bill provides that a first offender who pirates certain copyrighted material for profit (section 506, page 49), or who knowingly transports in commerce copyrighted material with a forged or counterfeited label (section 2318, page 64), may be imprisoned for not more than one year. A second or subsequent offender may be sentenced for up to two years imprisonment. A first offender can be charged under either section only with a misdemeanor—even though that offender has pirated thousands or hundreds of thousands of dollars of copyrighted material. These types of offenses are serious and are felonious in nature, and should thus be accorded the stature and consideration of other felony statutes.

We agree fully with the Department of Justice in its testimony to this committee that pirating of copyrighted works has become a major and serious problem. Consequently, convicted offenders should be subject to appropriate terms of imprisonment.

We also agree with this Judiciary Committee's statement in its Report last year on the copyright extension and piracy bill. Film piracy and counterfeit labeling are "economic" offenses, as the Report declared. But the Committee must also recognize that the statutes protect a constitutionally recognized right. Such "economic" crimes as embezzlement are subject to greater imprisonment penalties in federal statutes. Similarly, while antitrust violations are "economic" offenses, only last year Congress increased the antitrust imprisonment penalty to three years.

The piracy and counterfeit labeling penalties for imprisonment should be increased so that such offenses are classified as felonies and treated on an equal footing with similar "economic" offenses. *We therefore urge that a first offender under either section 506 or section 2318 be subject to a maximum of three years imprisonment and a second or subsequent offender be subject to a seven year sentence.*

V. BACKGROUND

A. *Copyright Liability of Cable Systems Under the 1909 Act*

Television is perhaps the largest user of copyrighted film programs. To use such programs, the television station must first secure a license from the program's owner. But cable television, on the other hand, picks up programs broadcast by television stations both local and distant and, for a monthly charge, retransmits them to individual set owners through wire or cable. Thus cable

systems which are privately owned, for-profit enterprises use program material free of cost that belongs to the owner of the copyrighted program material.

The 1909 Copyright Act did not of course anticipate the tremendous change that has taken place in methods of communication, the modern technological revolution in all modes of communication. Thus in *Fortnightly Corp. v. United Artists, Inc.* 392 U.S. 390 (1968), the Supreme Court of the United States held that the unlicensed use of essentially local broadcasting signals by cable systems which neither originated programs nor used microwaves, and which were merely "well located" antennas enhancing the viewer's capacity to receive the broadcaster's signals, did not constitute a copyright infringement within the terms of the Copyright Act of 1909. In *Columbia Broadcasting System, Inc. v. Teleprompter Corp.*, 415 U.S. 394 (1974), the Court held that the retransmission of programs from distant stations also did not constitute a copyright infringement. The Court made clear that it had no choice but to rule as it did under the 1909 Act. It called attention to the shifts in business relationships that cannot be controlled by litigation based on a period when neither broadcast television nor cable was yet conceived. It said explicitly that the resolution of these matters must be left to Congress and to a new copyright law.

B. *The Consensus Agreement*

We come now to the much talked about, the much misunderstood and the significantly important Consensus Agreement. In my testimony before the Senate Judiciary Committee on August 1, 1973, I dealt in great detail with the genesis of the Consensus Agreement, its provisions and their pertinence to the then pending copyright bill. Since that Senate hearing record is available to the Members of this Subcommittee, I do not intend to burden this record with repetitious details.

The cable operators now claim that the Consensus Agreement is dead. Yet, as we see it, the Agreement is very much alive. It has never been declared dead by the copyright owners or by the broadcasters, two of the three signatories to the Agreement. It has not been considered dead by the Federal Communications Commission or the Office of Telecommunications Policy, both of which agencies helped bring it to fruition and endorsed its provisions.

Insofar as the OTP is concerned, it has as recently as December, 1974, strongly reminded NCTA that OTP has supported the Consensus Agreement in the past and that it "consistently viewed the consensus agreement as operative and binding on all parties." (In a letter of OTP to David Foster, Chairman of NCTA, December 3, 1974). OTP said:

> Finally, in our recommendations to the FCC, the Department of Justice, the Congress, and the President on the issue of cable's copyright liability and the Administration's position on S. 1361, we proceeded in reliance on the good faith of the parties involved in the consensus agreement to adhere fully to that agreement.
>
> In our view, nothing has occurred since November 1971 to cause any party to the agreement to abandon its commitment of three years ago. None of the premises underlying the agreement have changed; the same equities which favor cable paying a share of program supply costs exists now as existed in 1971.

The Consensus Agreement is dead only in the mind of one of the three parties to it, the NCTA, because it walked away from it, abandoned it, and now paradoxically asserts it is no longer binding. These, I suggest, are strange concepts advocated by those who pledged their bond to a unique agreement that had won the imprimatur of unbiased government agencies.

We may ask what gave birth to the Consensus Agreement. Primarily, it was the FCC distant signal cable freeze of 1965 and 1966. The freeze prohibited cable systems from importing programs from distant television stations into the top 100 television markets. Why did the FCC take such action?

It didn't mince words. It said that such distant program importation by cable would impair local television broadcasting, it would tend to blanket the entire country with signals from the superstations in New York, Chicago and Los Angeles, and, mark this point, the FCC said it would be unfair to program producers and broadcasters who are required to negotiate with each other for the payment of programs while cable systems deny copyright liability and get a free ride at the expense of the two other parties. Put another way, the Commission said that so long as cable refused to pay copyright, it was unfair competition with television.

By 1971, cable entrepreneurs felt that the expected expansion of the industry had been hampered and unduly limited by the FCC restriction on the importation of distant signals. The broadcasters, the television stations, felt that it was wrong to permit cable systems to carry the same programs as they did without having to bargain and pay for them. And we, the copyright owners, wanted to end the charade that permitted use of our copyrighted property without receiving royalty payment for it.

Through the direct intercession of then-FCC Chairman Dean Burch and then-Director of the Office of Telecommunications Policy Clay Whitehead, the deadlock was broken. In November of 1971, the three parties accepted and signed the Consensus Agreement.

The copyright owners made substantial concessions and went along with the Consensus Agreement on the assumption that all parties in good faith would support the enactment of copyright legislation providing for the payment of royalties to be fixed by an impartial tribunal.

An important provision was the lifting of the ban on the importation of distant signals subject to certain limitations. This was the FCC's part of the Agreement. Senator McClellan commended the parties for the efforts they had made and expressed the belief "that the agreement that has been reached is in the public interest and reflects a reasonable compromise of the positions of the various parties." (Letter to then FCC Chairman Dean Burch, January 31, 1972)

With this assurance from Senator McClellan, the Commission implemented the regulatory provisions of the Consensus Agreement. Indeed, shortly after the signing of the Agreement, the cable industry received its major benefit from it, the "unfreezing" by the FCC of the restraints on the importation of distant signals. (see Cable Television Report and Order (37 Fed. Reg. 13848)) In lifting the freeze, the FCC made it crystal clear that it expected the Consensus Agreement to be implemented in its entirety and that only with prompt congressional passage of copyright legislation, could there be complete implementation.

Obviously this FCC action delighted the cable people; they had thus achieved their primary objective without having themselves carried out the other conditions of the Agreement.

As soon as the cable industry had received its benefits from the Consensus Agreement and while it enjoyed an explosive growth as the result of this newly gained freedom, the attitude of the leaders of the cable industry who had placed their signature on the Consensus Agreement, changed abruptly.

What were the important copyright provisions of the Agreement?

(1) The parties pledged themselves "to support separate CATV copyright legislation * * *."

(2) The copyright legislation to be supported by the parties would include "liability to copyright" and a compulsory license to cable systems to retransmit copyrighted programs without negotiating with the owners of the programs. The compulsory license was to cover all local signals as well as those distant signals the FCC permitted cable television to carry as of March 31, 1972.

(3) Because of the wide divergence of views between the parties on a fee schedule the Consensus Agreement specifically provided for an alternative method of setting these fees in the event that the parties should be unable to agree.

More specifically on this point the Consensus Agreement provided:

> Unless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, *the legislation would simply provide for compulsory arbitration failing private agreement on copyright fees.* (Italics supplied)

C. *NCTA's Continued Repudiation of Subsequent Agreements*

During the 93d Congress, the parties agreed to accept an initial royalty rate schedule graduated from 1 percent to 5 percent, depending on subscriber revenues of the cable system. Thereafter, rates were to be subject to adjustment by an impartial Royalty Tribunal authorized to review rates at periodic intervals. The Tribunal and the rate schedule were made a part of the then pending Senate copyright bill by Senator McClellan, and the rate schedule has come to be known as the McClellan rate schedule.

I would like to make it emphatically clear that the copyright owners were not overjoyed with these provisions of the McClellan bill. But in the interest of a hopefully speedy enactment of a new copyright law, our people swallowed their

indignation and accepted. The consoling fact was that while we felt that the McClellan rate schedule was arbitrarily put together and too low, the inclusion of a Royalty Tribunal could eventually meet that problem if the economic and marketing facts would later support our belief.

It is anticlimactic, I suppose, to tell this Subcommittee what happened. The same cable people who agreed with us and with Senator McClellan to support those provisions, once again as they did in the case of the Consensus Agreement, walked away from their agreement.

Instead, they actively lobbied for the adoption of the "Gurney Amendment" which arbitrarily—without any basis in logic or fact—sliced the McClellan fee schedule in half. The Gurney amendment proposed royalty rates from ½ percent to 2-½ percent of subscriber revenues and was adopted by a one-vote margin in the Senate Judiciary Committee.

Yet, still hoping for enactment of a copyright bill in 1974, we supported Senate passage of what we considered a seriously deficient copyright bill. We did so because we believed that as bad as it was, its redeeming feature was the Royalty Tribunal, and I committed myself to Senator McClellan to go along. The cable people found the Senate-passed version acceptable. That bill was S. 1361 which, as H.R. 2223, is now before you, and as S. 22 is now pending in the Senate Judiciary Committee.

But once again we now find cable repudiating what a few short months ago they endorsed. For the third time in three years they are walking away from prior agreements. Do you wonder why we, as copyright owners, are frustrated. We are not accustomed to deal with such maneuvering although I confess that perhaps we should have learned our lesson by now.

Cable now comes forward with a "shopping list" of nine items that they inform the committee will help "perfect" the bill. If they said that it would help perfect the bill for cable interests, I could understand the "perfections" better.

Their "shopping list" demands a complete copyright liability exemption for great numbers of cable systems and a partial exemption for all other systems. Next they request that the Royalty Tribunal be abolished so that the initial rate schedule becomes the final, fixed, statutory rate not to be changed except by an amendatory act of Congress. Third, they require that the definition of a "cable system" be ingeniously changed so that the effect will be to materially lower the royalty rate for that smaller number of systems that would become liable for copyright payments.

These and similar "perfecting" amendments are not perfecting anything. They are excuses for gutting the bill by exempting most cable systems from paying copyright, or they are attempts to delay and prevent enactment of any copyright bill. Cable television operators who have consistently repudiated their promises should not be rewarded. A copyright revision bill should be passed now, with fair royalty rates and with a reasonable means to adjust those rates. Further promises and compromises offered by cable should be ignored. They are used as a means of preventing enactment of any just copyright revision bill.

CONSENSUS AGREEMENT

Local Signals:

Local signals defined as proposed by the FCC, except that the significant viewing standards to be applied to "out-of-market" independent stations in overlapping market situations would be a viewing hour share of at least 2% and a net weekly circulation of at least 5%.

Distant Signals:

No change from what the FCC has proposed.

Exclusivity for Non-Network Programming (against distant signals only):

A series shall be treated as a unit for all exclusivity purposes.

The burden will be upon the copyright owner or upon the broadcaster to notify cable systems of the right to protection in these circumstances.

A. Markets 1–50.

A 12-month pre-sale period running from the date when a program in syndication is first sold any place in the U.S., plus run-of-contract exclusivity where exclusivity is written into the contract between the station and the program supplier (existing contracts will be presumed to be exclusive).

B. Markets 51–100.

For syndicated programming which has had no previous non-network broadcast showing in the market, the following contractual exclusivity will be allowed:

(1) For off-network series commencing with first showing until first run completed, but no longer than one year.

(2) For first-run syndicated series, commencing with first showing and for two years thereafter.

(3) For feature films and first-run, non-series syndicated programs, commencing with availability date and for two years thereafter.

(4) For other programming, commencing with purchase and until day after first run, but no longer than one year.

Provided, however, that no exclusivity protection would be afforded against a program imported by a cable system during prime time unless the local station is running or will run that program during prime time.

Existing contracts will be presumed to be exclusive. No preclearance in these markets.

C. Smaller Markets.

No change in the FCC proposals.

Exclusivity for Network Programming:

The same-day exclusivity now provided for network programming would be reduced to simultaneous exclusivity (with special relief for time-zone problems) to be provided in all markets.

Leapfrogging:

A. For each of the first two signals imported, no restriction on point of origin, except that if it is taken from the top 25 markets it must be from one of the two closest such markets. Whenever a CATV system must black out programming from a distant top-25 market station whose signals it normally carries, it may substitute any distant signals without restriction.

B. For the third signal, the UHF priority, as set forth in the FCC's letter of August 5, 1971, p. 16.

Copyright Legislation:

A. All parties would agree to support separate CATV copyright legislation as described below, and to seek its early passage.

B. Liability to copyright, including the obligation to respect valid exclusivity agreements, will be established for all CATV carriage of all radio and television broadcast signals except carriage by independently owned systems now in existence with fewer than 3500 subscribers. As against distant signals importable under the FCC's initial package, no greater exclusivity may be contracted for than the Commission may allow.

C. Compulsory licenses would be granted for all local signals as defined by the FCC, and additionally for those distant signals defined and authorized under the FCC's initial package and those signals grandfathered when the initial package goes into effect. The FCC would retain the power to authorize additional distant signals for CATV carriage; there would, however, be no compulsory license granted with respect to such signals, nor would the FCC be able to limit the scope of exclusivity agreements as applied to such signals beyond the limits applicable to over-the-air showings.

D. Unless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, the legislation would simply provide for compulsory arbitration failing private agreement on copyright fees.

E. Broadcasters, as well as copyright owners, would have the right to enforce exclusivity rules through court actions for injunction and monetary relief.

Radio Coverage:

When a CATV system carries a signal from an AM or FM radio station licensed to a community beyond a 35-mile radius of the system, it must, on request, carry the signals of all local AM or FM stations, respectively.

Grandfathering:

The new requirements as to signals which may be carried are applicable only to new systems. Existing CATV systems are "grandfathered." They can thus freely expand currently offered service throughout their presently franchised areas with one exception: In the top 100 markets, if the system expands beyond discrete areas specified in FCC order (e.g., the San Diego situation), operations in the new portions must comply with the new requirements.

Grandfathering exempts from future obligation to respect copyright exclusivity agreements, but does not exempt from future liability for copyright payments.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., January 26, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks and Copyrights,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is directed to an important policy aspect of our present deliberations on a new regulatory program to facilitate the evolution of cable television. That is the matter of copyright legislation, to bring cable into the competitive television programming market in a fair and orderly way—a matter with which you as Chairman of the Subcommittee on Patents, Trademarks and Copyrights have been so deeply concerned in this and the last Congress.

You will recall that we informed the Congress, in a letter of March 11, 1970 to Chairman Magnuson, of our view that a revised copyright law should establish the pertinent broad framework and leave detailed regulation of cable television signal carriage to this administrative forum. In line with that guiding principle and a statement in our August 5, 1971 Letter of Intent that we would consider altering existing rules to afford effective non-network program protection, we are now shaping a detailed program dealing with such matters as distant signal carriage, the definition of local signals, leapfrogging, and exclusivity (both network and non-network). That program is now approaching final action.

As of course you know, representatives of the three principal industries involved—cable, broadcasters, and copyright owners—have reached a consensus agreement that deals with most of the matters mentioned above. On the basis of experience and a massive record accumulated over the past several years, we regard the provisions of the agreement to be reasonable, although we doubtless would not, in its absence, opt in its precise terms for the changes it contemplates in our August 5 proposals. But the nature of consensus is that it must hold together in its entirety or not at all—and, in my own view, this agreement on balance strongly serves the public interest because of the promise it holds for resolving the basic issue at controversy.

This brings me directly to a key policy consideration where your counsel would be most valuable. That is the effect of the consensus agreement, if incorporated in our rules, on the passage of cable copyright legislation.

The Commission has long believed that the key to cable's future is the resolution of its status vis-a-vis the television programming distribution market. It has held to this view from the time of the First Report (1965) to the present. We remain convinced that cable will not be able to bring its full benefits to the American people unless and until this fundamental issue is fairly laid to rest. An industry with cable's potential simply cannot be built on so critical an area of uncertainty.

It has also been the Commission's view, particularly in light of legislative history, that the enactment of cable copyright legislation requires the consensus of the interested parties. I note that you have often stressed this very point and called for good faith bargaining to achieve such consensus.

Thus, a primary factor in our judgment as to the course of action that would best serve the public interest is the probability that Commission implementation of the consensus agreement will, in fact, facilitate the passage of cable copyright legislation. The parties themselves pledge to work for this result.

Your advice on this issue, Mr. Chairman, would be invaluable to us as we near the end of our deliberations.

With warm personal regards.

Sincerely,

DEAN BURCH, *Chairman.*

U.S. SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS

(Pursuant to Sec. 13, S. Res. 32, 92d Congress)

Washington, D.C. 20510

January 31, 1972

HON. DEAN BURCH,
Chairman, Federal Communications Commission, Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter of January 26, 1972, requesting my advice on the effect of the consensus agreement reached by the principal parties involved in the cable television controversy on the passage of legislation for general revision of the copyright law.

I concur in the judgment set forth in your letter that implementation of the agreement will markedly facilitate passage of such legislation. As I have stated in several reports to the Senate in recent years, the CATV question is the only significant obstacle to final action by the Congress on a copyright bill. I urged the parties to negotiate in good faith to determine if they could reach agreement on both the communications and copyright aspects of the CATV question. I commend the parties for the efforts they have made, and believe that the agreement that has been reached is in the public interest and reflects a reasonable compromise of the positions of the various parties.

The Chief Counsel of the Subcommittee on Patents, Trademarks and Copyrights in a letter of December 15, 1971 has notified all the parties that it is the intention of the Subcommittee to immediately resume active consideration of the copyright legislation upon the implementation of the Commission's new cable rules.

I hope that the foregoing is helpful to the Commission in its disposition of this important matter.

With kindest regards, I am

Sincerely,

JOHN L. MCCLELLAN, *Chairman.*

VI. TEXT OF PROPOSED AMENDMENTS TO H.R. 2223

A. *The "Stevens Amendment"*

On page 17, line 29, beginning with "or nonsimultaneously", strike out through "Commission" in line 38.

On page 18, line 3, strike out "or programs broadcast".

On page 18, line 5, immediately after "Commission and", insert "simultaneously".

On page 18, line 6, strike out "or programs".

B. *Increasing the Initial Fee Schedule*

On page 16, line 20, strike out "½" and insert in lieu thereof "1".

On page 16, line 21, strike out "1" and insert in lieu thereof "2".

On page 16, line 21, strike out "1½" and insert in lieu thereof "3".

On page 16, line 25, strike out "2" and insert in lieu thereof "4".

On page 16, line 28, strike out "2½" and insert in lieu thereof "5".

C. *Administrative Provisions Relating to the Royalty Tribunal*

1. Compensation of Tribunal; Library of Congress Furnishing Facilities and Staff

On page 60, strike out lines 33 through 37 and insert in lieu thereof the following:

"(c) Each member of a panel of the Tribunal shall be paid compensation only for each day (including travel time) he is performing his duties as a member of that panel.

"(d) The Library of Congress shall furnish facilities, equipment, supplies, services, and personnel to the Tribunal. The Library shall also procure for the Tribunal temporary and intermittent services in accordance with section 3109 of title 5."

2. Providing Initial Tribunal Staff Promptly

On page 62, line 8, insert "(a)" immediately after "102".

On page 62, line 9, immediately after "provided by", insert "sub-section (b) of this section and".

On page 62, between lines 10 and 11, insert the following:

"(b) Section 805(d) of title 17, United States Code, as provided by section 101 of this Act, is effective on the date of enactment of this Act. Not later than 60 days after such date of enactment, the Library shall provide for a staff, facilities, equipment, supplies, and services for the Royalty Tribunal so that data and other information necessary to conduct expeditiously the first review of the royalty adjustments contained in section 111 of such title 17, as provided by section 101 of this Act, may be available to the first panel of the Tribunal appointed under section 802(a) of such title 17 immediately upon its certification.

3. Prompt Review of Section 111 Royalty Rates and Adjustments

On page 59, line 11, strike out "July 1" and insert in lieu thereof "January 1".

On page 59, line 15, strike out "1984" and insert in lieu thereof "1982".

4. Expeditious Decisions by the Tribunal

On page 60, line 22, strike out "one year from the certification of the panel" and insert in lieu thereof the following: "90 days after the certification of the panel, except that if the panel determines, and publishes its determination in the Federal Register prior to the expiration of such 90 days, that it requires additional time to render its final decision, the panel shall have an additional 90-day period before it shall render its final decision."

On page 60, beginning with "Upon" in line 22, strike out through line 25.

D. *Section 111(d)(1): Clarification of Cable Ownership Notice Requirements*

On page 15, line 28, strike out "of the secondary transmission" and insert in lieu thereof "it commences the transmission of secondary transmissions".

On page 15, line 29, immediately after "is later.", insert "and thereafter within 30 days after each time the ownership or control of the cable system changes,".

On page 15, line 31, strike out "secondary transmission service" and insert in lieu thereof "cable system".

E. *Criminal Penalties for Piracy and False Labeling*

On page 49, line 38, strike out "one year" and insert in lieu thereof "three years".

On page 49, line 39, strike out "two years" and insert in lieu thereof "seven years".

On page 64, lines 23 and 24, strike out "one year" and insert in lieu thereof "three years".

On page 64, line 25, strike out "two years" and insert in lieu thereof "seven years".

VII. LIST OF MEMBERS OF MPAA, AMPTP, AND CCO

The members of the Motion Picture Association of America, Inc., include Allied Artists Pictures Corporation, Avco Embassy Pictures Corp., Columbia Pictures Industries, Inc., Metro-Goldwyn-Mayer, Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corp., United Artists Corporation, Universal Pictures, a division of Universal City Studios, Inc., and Warner Bros. Inc.

The member companies represented in the Committee of Copyright Owners are: Avco Embassy Pictures Corp., Columbia Pictures Industries, Inc., Metro-Goldwyn-Mayer, Inc., Metromedia Producers Corp., Paramount Pictures Corporation, Twentieth Century-Fox Film Corp., United Artists Corporation, Universal Pictures, a division of Universal City Studios, Inc., Warner Bros. Inc.

The members of the Association of Motion Picture and Television Producers are:

Aaron Spelling Productions, Inc.
A & S Productions, Inc.
(The) Alpha Corporation
Alpine Productions
American International Productions, a California Corporation
Artanis Productions, Inc.
Aubrey Schenck Enterprises, Inc.
Bing Crosby Productions, Inc.
Brien Productions, Inc.
Bristol Productions, Inc.
(The) Burbank Studios
Charleston Enterprises Corporation
Chrislaw Productions, Inc.
Cine Television, Inc.
Cine Guarantors, Inc.
Cinema Video Communications, Inc.
Columbia Pictures Industries, Inc.
C-O-P Productions Inc.
Daisy Productions, Inc.
Danny Thomas Productions
Darr-Don, Inc.
Dubie-Do Productions, Inc.
Edprod Pictures, Inc.
Filmways, Inc.
Four Star International, Inc.
Frank Ross Productions, Inc.
Geoffrey Productions, Inc.
Gus Productions, Inc.
Hanna-Barbera Productions, Inc.

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Harold Hecht Company
Herbert Leonard Enterprises, Inc.
International Television Productions
Jack Chertok Television, Inc.
Jack Rollins and Charles H. Joffee Productions
(The) Kappa Corporation
Legarla, Inc.
Leonard Films, Inc.
Levy-Gardner-Laven Productions, Inc.
Location Productions, Inc.
Lucille Ball Productions, Inc.
(The) Malpaso Company
Max E. Youngstein Enterprises, Inc.
Meteor Films, Inc.
Metro-Goldwyn-Mayer, Inc.
(The) Mirisch Corporation of California
Mirisch Films, Inc.
Mirisch Productions, Inc.
Murakami Wolf Productions, Inc.
NGC Television, Inc.
Norlan Productions, Inc.
Paramount Pictures Corporation
Pax Enterprises, Inc.
Pax Films, Inc.
Rainbow Productions, Inc.
Rastar Enterprises, Inc.
Rastar Productions, Inc.
RFB Enterprises
Robert B. Radnitz Productions, Ltd.
Samuel Goldwyn, Jr. Productions, Inc.
Sheldon Leonard Productions
Spelling-Goldberg Productions
(The) Stanley Kramer Corporation
Stuart Millar Productions, Inc.
Summit Films, Inc.
T & L Productions, Inc.
Twentieth Century-Fox Film Corp.
United Artists Corporation
Universal City Studios, Inc.
Walt Disney Productions
Warner Bros. Inc.
Wolper Pictures, Ltd.
Wrather Corporation

TESTIMONY OF JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA, INC., AND THE ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.

Mr. VALENTI. Mr. Chairman, my name is Jack Valenti, and I am president of the Motion Picture Association of America, and the Association of Motion Picture and Television Producers.

Between Mr. Howard and myself, we represent motion picture and television producers of copyrighted material; labor unions of technicians and craftsmen; actors, writers, and directors—in short, all of those people who work in front of and behind the camera to produce copyrighted programing for this Nation.

My plea to you is quite simple. We believe that cable television is a private business run for private profit and ought not be exempt from copyright, either in whole or in part. No private business should.

Second, we believe that the fee schedule in the bill you are now considering is about as low as a fee schedule can get and still be called fees. Under this bill, cable television would pay more for the postage stamp it puts on its monthly invoice bill to each subscriber than it would pay for copyright. That is how low it gets.

All the copyright owner wants is fair treatment. So far, cable has gotten everything it has wanted, with no relation to equity or fair treatment or the searching out of facts or truth. That is the way we see it.

Cable is coming back to you and asking you for more. I come before this committee to implore you to bring back fair judgment and equity into this debate before this bill is raped and tortured by cable interests who do not want to pay any copyright fees, who want to be set above the marketplace as if they were some divinely created enterprise, high above the traffic of where other people engage in sordid bargains and marketplace operations. They want the Congress to insulate them from risk.

You heard yesterday that their complaint was that they wanted to look into the future and know precisely what their expenses were going to be. I must tell you that I do not know of any other business that is

free from risk. They say investors do not want to invest because there is that risk. Is there another business in this Nation that can tell you, 1, 2, 3 years from now what interest rates are going to be?

As Congressman Badillo pointed out yesterday, what the labor costs are going to be, how many cancellations they might have, these are all part of the marketplace risk factor. And every man who invests money in the free enterprise system today understands it is a dicey forum.

I might add, when one of you gentlemen asked how many cable systems had gone bankrupt, there was rather a blank stare in return. Let me point out to you that in 1973–74, 189,513 businesses went bankrupt in this Nation. The first 10 months of 1974–75, 210,532 businesses have gone bankrupt· Not one of them was free from risk; not one of them asked the Congress to give them a risk-free future; not one of them got anything from the Congress in the way of exemption or a risk-free future.

If my plea seems passionate, it seems so because it is. We have huge reason to be concerned. What is cable television's aim? Let us make that, as some are wont to say, perfectly clear.

First, cable wants to keep from paying a copyright fee to anybody; and second, to exempt, either by revenue or some device, a portion of cable television from paying copyright fees.

Cable interests say we are not liable for copyright which would make cable television the business counterpart to Stonehenge or the Easter Island relics: a one-of-a-kind species in the American marketplace. To exempt all of cable television or a portion of cable television would be to confer a special privilege on a private industry, and I think it is arrogant of them to demand that.

Cable system owners are in the cable system business—what for? To make money, pure and simple. Nothing pejorative about that, but that is why they are there. They ought to be subjected to the same risk factors and the same cost factors as every other private business in the American marketplace—and particularly, their competitors in the television industry. They should be subjected to the same cost factors.

Ah, but say cable interests, we are just a little antenna service. We do not do any more than a house-top antenna does. You do not charge copyright fees for a house-top antenna.

House-top antenna, indeed. Cable television is a highly sophisticated industry using complex machinery and equipment of the most sophisticated kind.

I was in New Orleans, and heard Edward Allen, of Walnut Creek, Calif., who is an official of the National Cable Television Association, and the president of Western Communications, which operates cable systems in California with 60,000 subscribers. This is what he had to say—I am now quoting from Mr. Allen:

> We do receive those television broadcast signals at our headends. After we receive these broadcast signals, we process them, we amplify them, we distribute them, and then we make a charge for them. What we do to these signals after we receive them, to my mind,

says Mr. Allen,

> does in fact constitute a performance for profit.

Those are not my words, gentlemen, they are the words of a respected man in this business—and, I might add, an honest and candid member of the industry.

Ah, yes, but say the cable interests, what about the Supreme Court decision which held that we were free and affirmed cable's exemption from copyright. The answer is, the Supreme Court did no such thing. I do not have to explain that to you distinguished lawyers, you know that better than I. The Court held only that cable systems were not liable for copyright. Why? Because the Court was interpreting the 1909 copyright bill, a law 66 years old—and very feeble for its age—a law enacted before radio and television were even invented. This is what the Court said plainly—and, at least to my judgment, a bit plaintively—

> These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be

underscore "cannot be"—

> controlled by means of litigation based on copyright legislation enacted more than a half-century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships,

the Court went on to say,

> and any ultimate resolution of the many sensitive and important problems in this field, must be left to the Congress.

In short, the Court said to the Congress, look, gentlemen, you have got to construct a new copyright law; you have got to take into account all these new dazzling technological developments. That is not the work for the Court to do.

Then cable interests balked over that. They said, yes, but you copyright owners are getting double payment. To those trained in the law, this is a false-bottomed argument. The plain fact is—as I have been advised by eminent counsel—that copyright usually involves separate payments for multiple uses. You gentlemen are far more cognizant of that than I, and I leave that interpretation to you. But the contention that because one user, television, has already paid its copyright fee, that cable should use the same copyright material free is an argument that violates the very concept of copyright.

Cable television fragments the markets of local TV stations. When cable imports a signal from distant stations in faraway cities, it siphons audience from the local TV stations. No one can deny that.

And consider also that the cable system today pays not 1 cent for copyright, and yet cable imports distant signals to fragment the audience of local TV stations. What is more important to us is that it lessens or totally destroys the value of a film which is exhibited in one city and transported by cable to another city. It lessens or destroys the value of that film in the city into which it is imported.

In short, if the Congress were to exempt cable or any portion of the industry from copyright payment, the Congress would be conferring on cable—it would be legitimizing unfair competition against television, which itself is unsubsidized and which pays copyright.

I want to interrupt my comments to comment on what my good friend, Commissioner Ford, talked about yesterday of paying a double ticket. Let me get to that.

Cable systems do not pay a double ticket, as the former Commissioner pointed out. It is not the same person who is buying two tickets to the same performance; it is two different people buying one ticket each to the performance. That is the basic concept of copyright: Separate payments for multiple use.

Let me give you an analogy.

Would you not agree with me if I said that most of the telephone poles that are put up by A.T. & T. around the country are paid for, are amortized; they have already paid for them. Yet cable systems are not exempted by the Congress from paying the telephone company when they hook up their cable to the telephone pole. They do not say, wait a minute, that pole is paid for; to pay for its use is a double ticket, boys; we are paying you twice. You have already had it paid for by your own subscribers, now you want us to pay you again for the use of those poles. That is essentially the cable argument about copyright.

I have not heard anybody quarrel with the telephone company's contention that they want payment for pole rental. The same concept holds, separate payment for multiple use.

Furthermore, let us remember this, the compulsory license covers local signals, so that is part of the deal. Instead of having a free negotiation in the marketplace, you avoid that negotiation in the marketplace—which cable wants to avoid like the plague. So, the local signal is covered by the compulsory license; all signals. The concept of separate payment for multiple use holds there. And I might add, I think Congress ought not be defining local signals or distant signals. Technology is advancing with avalanching revision. What is a distant signal today, may be a local signal tomorrow or vice versa.

To have cable television fragmenting local television station audiences, causing copyright owners to lose revenue by the importation of their programs from one city to another, competing unfairly against TV stations, paying no copyright fees, using its profits to increase its subscribers to further fragment the local TV audience—all this is wrong.

If the Congress exempts television—cable television—from copyright, in my judgment the Congress will not only be magnifying and sanctifying a terrible injustice, but it will have created a huge parasite in the marketplace, feeding and fattening itself off of local television stations and copyright owners of copyrighted material. We do not like it because we think it wrong and unfair.

There is no more to be said by me on the subject of copyright exemption. I am going to leave it to this committee to make a thorough examination of the truth and the fairness of what I have said. You will make your own judgments.

And now to the second aim of the cable television industry: To destroy the Royalty Tribunal as an effective referee in ratesetting and to freeze forever the fees. That is what they want.

All we, as copyright owners, have asked the Congress is to be treated fairly, to have a right to receive what is a fair copyright fee. Honest difference of opinion exists on what is fair; we know that and you know that. We have no marketplace experience of any substance to guide us as to what is fair for cable and what is fair for copyright owners. But I think there is a corollary to be examined, because we have considerable experience with the television industry, and that experience tells us that the fee schedule in H.R. 2223 is very, very low. That is why we strongly believe that at a very minimum, this committee ought to return to the original McClellan fee schedule, which ranged from 1 to 5 percent on subscriber revenues.

Let me go back briefly to television's experience with copyright because I think it goes to the heart of something you said yesterday, Mr. Congressman.

Networks and individual television stations depend on copyrighted material for their sustenance, just as cable does. Copyrighted programing is the one indispensable product that the television industry must have to service viewers, just as cable does.

Now, in 1973, from figures that we got from the Federal Communications Commission, the average cost of copyrighted programing for the three networks, for all the affiliated stations and all the independent stations in the country, amounted to 25 percent-plus of their total revenues.

Mr. DRINAN. At this point, let me ask, granted that the 25 percent went to the programing, but how much went precisely and exclusively for copyrights?

Mr. VALENTI. I am saying this is for copyrighted programing.

Mr. DRINAN. Yes, but how much actually went to the copyright? That if a local cable originated something, he would pay at least 25 percent to it. So, this does not tell me very much, Mr. Valenti; that 25 percent went to copyrighted programing. But how much went to the copyright?

Mr. VALENTI. You mean how much money, absolute money? I do not have that figure right in front of me.

Mr. DRINAN. That is the critical one, in my judgment.

Excuse me for interrupting, but I just wanted to——

Mr. VALENTI. I will be very happy to give it to you; I just do not have it in my memory or in my papers.

[The information referred to follows:]

The FCC's data shows that gross revenues of all network, all affiliated stations, and all independent stations totaled $3,970,059,000 in 1973. Expenses in that year for what are assumed to be copyrighted materials, defined in the case of networks as "amortization expenses on programs obtained from others," and as "rental and amortization of films and tapes" in the case of stations, plus "music license fees" and "records and transcriptions" come to $893,964,000, according to the FCC. Obviously only a portion of this sum went as payment to film producers for their copyrighted material.

Mr. VALENTI [continuing]. I was trying to establish some comparison of what television is paying for copyrighted programing, however pertinent that fact may be.

I go on to say that I do not cite this, Father Drinan, as being a measuring stick for cable: not at all. But it points up one crucial factor this committee ought to be aware of: that copyrighted program material costs a lot of money to the television industry, which must compete with cable television.

I think what is relevant about this 25-percent figure for television copyright costs is that it shows how modest, how almost nonexistent are the fees under H.R. 2223, and even under the McClellan rate schedule. Let me give you some arithmetic.

The rate schedule in H.R. 2223 imposes on 70 percent—7 out of 10 of all cable systems in this Nation—the equivalent of 3 cents per subscriber per month.

The original McClellan rate schedule would bring that to 6 cents a month per subscriber for 70 percent of the systems. The very largest system would pay less than 12 cents a month per subscriber; it would be about 12 cents because the effective rate of the McClellan schedule for all systems figures out at 1.9 percent overall. The effective rate of the Gurney amendment, which is in the bill before you, is 0.9 percent

for all systems. By whatever gage you choose to employ, no cable system can find the equivalent of 3 cents or 6 cents or even 12 cents a month per subscriber as being excessively high or inflationary to justify a system to raise its rates to the subscriber.

I think you can be sure of one thing; if cable systems start raising rates, as I will point out they have, it has not been because of imposition of a copyright fee of 3 cents a month or 6 cents a month. But rate increases are the bogeymen which cable interests are parading before you. Some cable interests insist they have got to raise their rates if copyright fees come in; they just cannot exist, they are going into bankruptcy if they have to pay an extra 3 cents per subscriber per month.

With the implicit alternative that if there are no copyright fees, of course, there would be no need to raise rates. Now, the truth, gentlemen, is somewhat different. I would like you to remember the following quotation. It is from Russell Karp, the president of Teleprompter Corp., the largest cable conglomerate in this Nation, with more than 1 million subscribers—more than any other cable interest. This is what Mr. Karp said 1 month ago, May 13, 1975, to a group of security analysts in New York: "Our," meaning Teleprompter, "our average monthly rate per subscriber went from $5.37 in 1973 to our current monthly subscriber rate of $6.68, a 24-percent increase." Now, virtually all of this improvement falls to the bottom line. I am sure I do not have to explain that to you gentlemen.

Now, here, Mr. Karp again in the same speech—this is a critical sentence I am going to read you. Mr. Karp says: "At the NCTA convention, a group of multiple systems owners at a panel I headed had no difficulty in predicting a $10 a month rate by 1979."

Thus, Teleprompter reveals to security analysts that the rates are going up, right now, and they are mighty proud about these increases.

Incidentally, I have before me a document that Congressman Railsback mentioned the other day he would like to have. It is Teleprompter's 1974 Annual Report—I am assuming full disclosure and accurate information. Here are some items:

> Revenues from continuing operations increased $13,900,000 from $72,900,000 to $86,800,000. Operating profits increased $18,100,000 and we have renegotiated our bank credit agreements so as to provide the company with an up to an additional $20 million.

They were fortunate enough to find one lender who was not worried about whether the price increases were going to include a copyright fee because they got $20 million out of a very brave lender.

Now, that is the Teleprompter story. What should the rate schedule be? As I have just said until all the data is brought forward, until there is some kind of organized search for facts, no one can really say. That is why we believe that if the Congress wants a fee schedule in the bill, that is your judgment to make.

It ought to go back to the original McClellan fee schedule. The McClellan rate schedule, as you pointed out, Mr. Chairman, was cut in half in the Senate Judiciary Committee. Why? I do not know. For no other reason, I suspect, that is what cable wanted and that is what they got. It was cut in half. The Gurney amendment passed by just one vote in the committee. How did it pass—without any hearings, without any data being weighed, without any new facts being inserted? It was just cut in half, period.

Therefore, in the absence of common sense or logic of factual data or arithmetic or whatever else, your bill ought to reinstate the original McClellan fee schedule. Then after the bill is passed a dispassionate and impartial and unbiased royalty tribunal can examine facts and weigh them and look at data and ask questions and open up the books and see what people are paying and what they are receiving, and then periodically make decisions on a fee schedule. That is why I think it is necessary to create a royalty tribunal for this purpose, as the bill proposes.

Congress, again as Mr. Badillo pointed out, does not have the time or the facilities to set copyright rates; is it not fair to have a Royalty Tribunal? Is it not a reasonable suggestion because neither cable interests nor broadcasters nor copyright owners have any advantage?

But, cable interests want to bleed and destroy this Royalty Tribunal before it even gets created. This is all kind of painful and absurd, at least it is to me, and so unfair that we ougth not waste our time discussing such foolish suggestions.

Yet, even after getting their Gurney amendment, cable interests still are not satisfied. Now, they want more. What do they want? They importuned this committee to exempt the first $100,000 of revenue and, get this gentlemen, exempt $100,000 from all systems. I do not know whether that was made clear yesterday; this $100,000 exemption is not for that little mom and pop system, it covers every system in the land, large and small.

What is the rationale for this exemption demand? Is it to help small systems? Is that what the Congress thinks a small system needs? Under the bill you are considering, a 500 subscriber system would pay how much? Fifteen dollars a month for the total system for its copyright fees. The 1000 subscriber system would pay how much? Thirty dollars a month in total for the copyright fee.

Now, is that so massive, so inflationary, that it is going to bankrupt small systems? Remember, the 1000 subscriber system is going to pay $30 a month or $360 a year and that system has revenues of $72,000 a year. Maybe the rationale is that Congress wants to help an "infant industry." Radio and television were infant industries once, you did not exempt them. Are you exempting any other small industries in this country that are trying to grow because they are infants? Maybe it is because the big systems need help, is that why cable interests want to do it? Remember they would get the exemption too.

Let us go back to Teleprompter—they have revenues running this year at an annual rate of some $90 million. And analysts predict and Paul Kagan's newsletter confirms that analysts predict that in 5 years Teleprompter is going to produce revenues of $200 million a year. Teleprompter, you must understand, has over 130 systems, at last count 136. Many of these individual systems are going to get that $100,000 exemption. Thus, Teleprompter, like other large systems, would get a rich bonanza for a big system conglomerate like Teleprompter would not be exempted from $100,000 but from $4 to $7 million in revenues. That exemption is a windfall for the large systems.

That is why the $100,000 exemption has no base, no rationale, no logic, no meaning. I hope this committee will listen but will not oblige cable interests when they want to substitute inequity for fair play. I believe that the Royalty Tribunal is the only sensible method to cut

through fantasy arguments and counter-arguments. Let some expert body of dispassionate and impartial people consider the evidence and hand down decisions.

This is a fast moving communications world we live in, Mr. Chairman. That is why I think every 5 years there ought to be an examination of the fee schedule. Things are moving so fast and no seer and no man of whatever experience can predict accurately where the future is going to take us, particularly in communications.

Gentlemen, I thank you very much for your patience and your time and attention. I would have liked to have treated with several other amendments dealt with in some detail in my formal statement which do not basically change the shape and form of the bill but I think will strengthen it. But, you have the texts and justifications in my statement filed for the record. I just hope you will be wary of amendments that have as their aim to gut this bill, to reduce or freeze the fee schedule, to install baseless exemptions, to erode the power of the tribunal, to redefine cable systems so that the large systems very cleverly can pay the same rate as the smaller system.

I have taken more of your time than I wanted to but this is very important, it is the only opportunity we have with you.

Thank you very much.

Mr. KASTENMEIER. Thank you, Mr. Valenti.

Actually, in response to Mr. Drinan's question, the difficulty is that the television industry pays the motion industry or the industry that produces programs for a total production rather than for something called a royalty I suppose in and of itself. Is it difficult for you to compare royalty versus royalty?

Mr. VALENTI. Let me tell you something about how the industry operates.

Mr. KASTENMEIER. That might be useful.

Mr. VALENTI. We sell television series to the networks and right now our industry has terrible problems because the prices we are getting for our television series do not meet their costs.

We have certain option agreements with the networks which do not allow us to recoup costs. Only if the series is a success, and it stays on the air for 4 or 5 years does it accumulate enough program episodes to go into syndication.

So, for most companies making television programs today it is a loss proposition unless the producer is lucky enough to have a long running series.

And, secondly, the sale of feature films—we sell our films on a flat rate—not on a percentage basis. The average price paid for a feature film today by the networks is about $800,000. The average cost, negative cost of a film today, is some $3 million. Seven out of ten films do not recoup their negative cost, advertising and print cost. Seven out of ten are losers.

The producer hopes he will have an Exorcist or a Sting or some other large grosser and he is happy about that, but overall in this business 7 out of 10 movies lose money.

The networks are sold on a flat basis and thereafter we go to the local station for what is called the syndication market. Here again, we sell the right to exhibit for whatever the traffic will bear; you

might sell a film for $200, you might sell it for $100, you might sell it for $1,000, depending on the size of the market, the demand, and so forth. It is a marketplace negotiation. The syndication market is very valuable to us because oftentimes it is the last resort for our producers to recoup at least a paper profit on the film. And so we count these sales to individual stations very important.

Mr. KASTENMEIER. Is the sale figure—do you consider the sale figure, whatever it is, as a royalty?

Mr. VALENTI. Legally it is royalty. We get money for the films we license. Mind you, we would like to do that with cable, the same kind of negotiation in the marketplace. The only reason why we have a royalty rate schedule is because it is in the bill that came from the Senate. We would like to go back into free marketplace negotiation, just as we do with everybody else. We could license a film to cable for $100 or $50 or $8,000, or whatever the appropriate rental would be.

Mr. KASTENMEIER. What rights in the program series, what rights does a network customarily have in that program—that is to say, each of the programs? Does it have an exclusive? Does it have a right to sue others for infringement?

Mr. VALENTI. Absolutely. Yes, sir, it has rights under its license agreement.

Mr. KASTENMEIER. What is the nature?

Mr. VALENTI. One of our companies holds the copyright, and it licenses the film for a contractual use of that particular series. The licensee may have it under various options of successive year use with possible incremental increases in the rental fee, or whatever. But it is a contractual right, just as I contract with you to rent my house. You have a contract, a lease arrangement.

But, the ownership of the copyright rests with the copyright owner, not with the network, except where the network owns the program itself.

Mr. KASTENMEIER. In this case, the copyright owner would be probably a Hollywood production company.

Mr. VALENTI. It could be Paramount, MGM, Universal, any one producer or distributor who may have acquired the copyright.

Mr. KASTENMEIER. So, it licenses the network for certain uses; maybe it is probably exclusive for periods of time; but the network would not customarily be able to license others to use that program.

Mr. VALENTI. Mr. Chairman, now you are getting into a level, where the lawyers move with dazzling speed. I am not sure of my footing here. I do know the following: It is a license arrangement; exclusivity may be appended to that contract. There are option agreements, and after a specified length of time, when the contract runs out, the copyright owner retrieves that series and then puts it into syndication.

You will see a number of series programs on channel 5 or channel 20. Those are syndicated programs that are no longer on the networks and are now being syndicated to local stations.

Mr. KASTENMEIER. Mr. Valenti, were the Motion Picture Association of America and the Association of Motion Picture and Television Producers parties to the consensus agreement?

Mr. VALENTI. Yes, sir.

We had what is known, Mr. Chairman, as a committee of copyright owners. It was an amalgam of members of AMPTP, Association of Motion Picture and Television Producers, the MPAA and some other

companies with similar interests. It was a special ad hoc group to represent those entities. But, essentially, the answer is yes.

Mr. KASTENMEIER. Do these two associations feel bound by that agreement?

Mr. VALENTI. Of course we did and do.

Mr. KASTENMEIER. You heard a description yesterday of how the agreement was entered into. Do you know of your own knowledge whether that was an accurate description?

Mr. VALENTI. The consensus agreement was signed because the cable interest wanted it signed. You must understand that the consensus agreement gave the cable interest the big casino, the big prize, the thing that glistened out of their reach for so many years since 1966. It unfroze the cable marketplace. It allowed cable to import distant signals, a fantastically worthwhile asset.

I want to tell you how worthwhile that asset was. Within hours after the signing of the consensus agreement and the FCC implementing it and allowing distant signals to be brought in by cable, Teleprompter's stock soared to 117. Shortly thereafter it split 4 for 1, and rose to over 40. That is what the investing community thought about the worth of that asset which was gathered in by cable through the consensus agreement. So, you bet your boots they wanted to sign it, because it gave them the one major thing they wanted.

You might ask what did you people get out of it. We got something, but mostly a hope and a promise. We got varying degrees of exclusivity. That is not what we really wanted. Since then, I think, it is fair to say, and some of my professional colleagues here could elaborate on this, that exclusivity, which was our principal issue with the FCC, proved to be of marginal value, and has been honored more in the breach than in the acceptance.

As I said, the impetus for the consensus agreement signing came from the cable people. The Federal Communications Commission imposed a freeze in 1968. Why? Mainly because they thought the failure of cable to pay copyright was, if I may use the word, another kind of piracy. This failure allowed cable television to compete unfairly in the marketplace, said the FCC, *hence the freeze*. So, I think the cable people were prepared to do anything to get that freeze lifted. They got what they wanted out of the consensus agreement.

I must tell you that while I am passionately concerned about copyright, we are all so very much in favor of cable. In behalf of the copyright owners I testified before the FCC and before Senator Hart's Antitrust Committee urging the expansion of pay cable, or as we call it family choice cable, because we think cable represents in the future a supplemental market for our products. But we believe the consensus was in the public interest and in our own self-interest. We indulged in a kind of shuttle diplomacy between New York and Washington trying to get it done.

The consensus agreement was signed. It is an official document. It was published by the FCC in "The Federal Register." Chairman Burch sent a copy of it to Senator McClellan. I have a copy of the exchange of correspondence. Senator McClellan wrote back to Dean Burch and said, and I quote, "I commend the parties for the efforts they have made, and believe that the agreement that has been reached is in the public interest. It reflects a reasonable compromise of the various positions."

I have perhaps told you more than you want to know about the consensus agreement.

Mr. KASTENMEIER. You perhaps heard, it was stated that Peter Flanigan, perhaps to some extent the FCC and the Office of Telecommunications Policy, to some extent bludgeoned the parties into acquiescing, to agreeing to this. As representing a couple of parties to this agreement, do you feel that, were you aware of any of these extraordinary efforts on the part of those?

Mr. VALENTI. No. I do not know about that. But, Mr. Chairman, we can go back again to bedrock common sense. The environment in which that consensus agreement was created, the ambience of the moment, a freeze on cable television, no distant signals could be imported. Cable television stunted, atrophied.

If you were in that situation, what would you do? You would want to do all you could to unfreeze, to thaw the freeze, as it were. If cable was bludgeoned, it is because they wanted the quid without the quo. They wanted to unfreeze, but without giving up something. Consensus was a compromise. The networks and broadcast licensees were not satisfied with the consensus agreement. We were not wholly satisfied with the consensus agreement. Cable says they were not satisfied, but they did a very marvelous thing. It was a kind of interesting way to handle it. They took what they liked, and walked away from what they did not like. That is what happened.

We thought the copyright bill was so important that we were willing to sacrifice some things we did not like on the consensus to get a copyright bill enacted. That is the play of the marketplace. It happens in family life and political life. It happened in the negotiation. So, I do not know about anybody being bludgeoned. All I know is that cable got a vast asset, and the stock market quickly reflected that, and we did not get a copyright bill.

Mr. KASTENMEIER. One thing, of course, you have to concede the cable industry had, was at that time, perhaps, one, and later a second Supreme Court decision in its favor, which, I suppose, was a factor.

Mr. VALENTI. Mr. Chairman, obviously it was a factor. Of course it was a factor. It was one of the factors that was weighed in the consensus agreement. You are absolutely correct, sir.

Mr. KASTENMEIER. Let me ask you, Mr. Valenti, to what extent does the Senate passed bill, last year, embodied in H.R. 2223, express the consensus agreement? I will put it a different way—to what extent does this digress from the consensus agreement?

Mr. VALENTI. I think basically the consensus agreement, among other things, said that if the three parties could not privately agree on a negotiated fee schedule, that a royalty tribunal would be put into legislative construction and a royalty tribunal would decide what those fees would be. That is one thing that is not in the bill. Obviously, in the bill, there are no provisions dealing with regulatory functions, distant signals, exclusivity, which I am given to understand may be beyond the purview of this committee. But that is something for you gentlemen to decide, and not me. To the extent that the consensus agreement did not have a fee schedule and would start out with an arbitration tribunal to set initial rates, this H.R. 2223 does differ in more than casual form from the consensus agreement.

You have a legitimate reason to ask why did you go along with the Senate bill. We struggled. We did not think the McClellan fee

schedule was the right thing for us. We thought it was painfully low. We made known our distaste to Senator McClellan on a number of occasions. Then we were horrified that at 1 minute to midnight, as it were, in the last hours of the markup, we learned that the McClellan fee schedule was cut in half. By that time it was just too late to do anything. While I made clear to Senator McClellan my distaste for it, I got out of the way of the avalanche, and the bill passed the Senate, and you have it here now.

As far as we are concerned, we were willing to accept the bill, if we could get the McClellan fee schedule reinserted because we think even a bad copyright bill is better than no copyright bill. It will bring some sort of order to a chaotic marketplace.

Mr. KASTENMEIER. In terms of the question relating to section 111, the only change you recommend in the bill is to return to the original McClellan fee schedule.

Mr. VALENTI. No. We have some amendments, Mr. Chairman, that are of particular concern. One, the so-called Stevens amendment, which has to do with nonsimultaneous transmission off-shore, the taping of programs for use in Alaska and Guam. There are a number of others of a more technical nature.

We are very much opposed to the Stevens amendment. It was put forward as a result of unusual geographic and environmental conditions in Alaska where many villages literally cannot get television of any kind. They are isolated. So, Alaska cable systems taped programs illegally in the States and then ran those taped programs. I urged my companies, and they were eager to follow my urging, that it was in the public interest to make a special agreement for Alaska. This we have done, and we have given permission to Alaska cable systems under control and monitoring to tape programs, because taping is piracy if it is unauthorized. That is now operating and the Alaska cable system owners are perfectly satisfied.

We are willing to make the same deal with Guam, so that they will have permission to tape our programs under a license agreement. But, there is no need of taping by cable systems in Hawaii and Puerto Rico because the number of television stations is as large or larger than on a similar area within the continental United States.

That is one of the principal deletions that we would urge in this bill, Mr. Chairman.

Mr. KASTENMEIER. Is that a change to section 111?

Mr. VALENTI. Yes.

Mr. KASTENMEIER. The gentleman from Illinois.

Mr. RAILSBACK. Mr. Valenti, yesterday we heard testimony that I am going to ask you to respond to, if you will.

It deals not with legal liability, but rather with the practical effects of having an expanded market and how that allegedly benefits a copyright holder.

Let me give you an example.

Then the television networks, or an independent nonnetwork station which has access to cable, or where cable is carrying its program—for example, WGN in Chicago, which is carried by many, many cables, sells its programing to a buyer, it can say, look, you are not just getting a limited market. You are getting access to this very expanded market carried by cable. Presumably, so the story goes, they can charge more, naturally, to that potential buyer. The advertiser, then, in addi-

tion, a copyright holder like some of your firms, would take that into account in selling that particular program to the network or to the nonnetwork station. The witnesses yesterday showed us advertisements that listed the networks or the stations actually referring to this expanded market because of cable.

So, from the standpoint of the copyright holder, it would appear to me that they make a pretty good case, that they ought to be partaking in those additional benefits.

How do you respond to that?

Mr. Valenti. Mr. Railsback, I am reminded of what Thomas Carlyle once said about one of his contemporaries. This man has spent his entire life plastering together the truth and the false, and therefrom manufacturing the plausible. That is what this is all about.

One has to approach this issue at two levels, Mr. Congressman. The first level is the relationship between the advertiser and the network or the independent station.

The next relationship is between the copyright owner and the station licensee with whom he deals.

Let us take the first relationship.

The broadcasters are here, and they will speak to the relationship between advertiser and broadcaster, because that is a bargaining process we do not get into. But I must say, when you ask a station if it is getting paid for this extra cable coverage, the answer is uniformly—no. It defies credibility to me that a used car dealer in Baltimore would pay the Baltimore station extra money because the program on which he advertises is carried in Richmond, Virginia. It boggles my mind that any advertiser is that naive. Insofar as the copyright owner is concerned, I can tell you——

Mr. Railsback. Let me ask you this, if I may. I agree with you, but what about a regional advertiser that would be willing to pay?

Mr. Valenti. I used to be in the advertising business quite some years ago. You bought advertising to cover a market: and if you wanted to buy Richmond, you would not depend on the cable situation in Baltimore to cover Richmond. You would buy Richmond directly also. If the advertiser is getting some extra coverage though, it really is not that important to him. If he wants the other market, he does not get it by the reach of a cable system. You want to buy an entire market, not what the cable system might add. But as I say, that is a relationship, Mr. Railsback.

Mr. Railsback. But you would concede there are some benefits obviously derived from expanding your market through cable?

Mr. Valenti. It could be, sir. I think it is possible, but I think with respect to the arena with which I have more than casual familiarity, the copyright problem, I can tell you flatly that insofar as we are concerned, the additional cable coverage is not a factor in the price that we get. It is just not an asset value that yields a higher license from the station.

Mr. Railsback. Why not?

Mr. Valenti. I will tell you why. If we even get a marginal increase, we would lose more under the following case. Suppose we sold a film, say "The Sting," to Baltimore. We got $700 for "The Sting" there. We also sold it to Richmond for $600. Now, "The Sting" plays in Baltimore first. It is lifted out of Baltimore and brought in on the Richmond cable system, and the Richmond station says hey, wait a minute,

boys; I paid you $600 for that program, and now cable's showing it a month before I am supposed to show it. I am either not going to buy it, or only give you $150 for it. Therefore, we have lost revenue on "The Sting." If we add it up, we could get far more money if it played in Baltimore and played in Richmond on separate sales to the two television stations and did not have the importation of distant signals. The same problem exists in series programs syndication. Our business is hurt because the audience has been fragmented. Insofar as we are concerned, it is a detriment, not a help, to us.

Mr. Railsback. You are very experienced in your business; and you would certainly know, what you were selling and what market you were selling to. If you were the copyright holder selling to Boston, you would know of the cable market and how that cable market there would expand your coverage. I would think that would be part of your negotiation.

Mr. Valenti. Well, Mr. Railsback, what seems plausible at this council table is not the situation in negotiation. The local audience is really the key as far as the station in Baltimore is concerned. They are not going to pay any more money for a program because it is being imported by cable into Richmond. They might get some more money out of an advertiser if he wants those cable homes but they sure as the devil do not pay us more money for the program because of that. If they do, it is marginal.

Mr. Wiggins. I have been fidgeting here, Mr. Valenti, because I do not believe what you have said. I am going to give you an opportunity to correct my impression. You have told us, a few moments ago, that when you sell a movie to a net, you get perhaps as much as $800,000. And yet, when you sell a movie to a local station, you may get $100 or $200, even up to $1,000. There is a big difference between $800,000 and $1,000; and I suggest that the principal reason for that difference is the difference in market.

Mr. Valenti. I am sorry, Mr. Wiggins. I did not mean to—I was talking about station syndication. You are talking about network sales.

Mr. Wiggins. I am trying to make the point that your copyright owners get more money for a sale to a large market than they do to a small market.

Mr. Valenti. Absolutely.

Mr. Wiggins. Having conceded that point, you then address yourself to the narrow point of the sale to a local market. Do you extract a higher fee because that local market is expanded by a cable system?

Mr. Valenti. I have examined all of our companies on that very point, and they tell me the answer is no.

Mr. Wiggins. I think that information is of some critical importance to the committee, and if there is some way that it can be documented so that the facts can be laid to rest with respect to this assertion that the copyright owner, in fact, is paid more by reason of the expanded cable market, it would be most helpful.

Mr. Railsback. I think it is a very relevant question, as far as when we decide how we want to provide incentives to an author or to a producer or to a production firm, to take into account what kind of benefits he derives by reason of that expanded market.

Mr. Valenti. I think we have to insert another piece of fact into this equation. You are talking about a market. Mr. Wiggins is correct: let us take Houston, Tex., my home town. That is about the thirteenth

largest market in the country as a market. In Houston, Tex., there are three network affiliates and two UHF's. There are five stations in Houston. Tex. If they have a cable system there, it would be importing additional signals. They would have three, three and one—a total of seven signals.

Now, when cable brings in two more stations into Houston, what happens? You fragment the audience of any single Houston station. The obvious is that some station is going to lose audience—probably all of them—because the TV homes have alternative sources of viewing. So the importation of distant signals really hurts an advertiser, because it allows foreign stations to come into that market and fragment what he has bought. That is point No. 1.

Point number two, unlike network, which is nonduplicated, you know you have exclusivity. When "Godfather I" is shown on CBS or NBC, you know that it is not being sold to any other station. We sell first to networks, so they have exclusivity. But I am talking now about our other valuable market called syndication. We will take a picture or a package of film, and we will sell it to 300 television stations in this country. Mr. Railsback, in that case our people are getting varying amounts of money, depending upon the size of each television station market—not cable market, but the size of the individual market. So, if you sold the film or the package say, 300 times around the country, 300 different stations, you do not know when they are going to telecast it. You do not have a specific schedule. They may have bought a total of 20 pictures from you. They are going to space their showing out over a period of, say, a year. You have sold it to Dallas, you have sold it to San Antonio, you have sold it to Bryan. All of a sudden, this picture is picked up by cable systems and goes into these other markets from Houston. We have thus lost a tremendous amount of revenue, because the TV stations are not going to pay you when their audience has already seen the picture, for which they paid the full value—has already seen it 1 week or 1 month before.

That is the disfiguring aspect of the signal importation. I do not care what the advertiser pays for the program. It is what we get for it on a syndicated basis. It has nothing to do with networks, because we sell them for an average of $800,000, but based on their total nationwide market, Mr. Wiggins, and on the popularity of the film. You get more for "Gone With the Wind," because it is a popular film.

Mr. Wiggins. You do not deny the fact that when a popular film is going nationwide it becomes a factor which enters into the price?

Mr. Valenti. Absolutely. That is what the price is all about. Now, the average price that we get for films, if you took all the films we sold to the networks, the average price is $800,000. That is the point I am making; a popular film commands more money.

Mr. Railsback. Just one more question, Mr. Valenti. Yesterday, it was pointed out that the fee schedule set involves gross revenues which presumably, again, would take into account any substantial inflation etc. Why is there a need to have a tribunal review, inasmuch as that rate is determined on gross rather than nets? I want you to give us your views, if you will.

Mr. Valenti. Gross?

Mr. Railsback. I am talking about gross revenues.

Mr. Valenti. We support—we believe, if I am responding, to your question, it should be gross subscriber revenues; we think that is fair.

Mr. RAILSBACK. The people who testified yesterday argued that there should be no need for a reviewing tribunal for this reason. If the rate fee is fixed in the bill on gross revenues, a rate which is initially fair—which you may quarrel with, presumably and as the industry grows, the cable industry would grow, and so presumably would your revenues.

Mr. VALENTI. Mr. Chairman, we both know that the rate of growth is not the same. We are never going to get, under this bill, more than 1.9 percent as the effective rate. I am saying to you, I would like to know if that rate is a fair one, and does it remain fair as new technological developments come into being? In 10 years cable may preempt free television. I do not know.

I am merely asking you, what is wrong with having an unbiased royalty tribunal do something that Congress does not have time to do? We are starting out with a rate, Mr. Railsback, whose origins and source, in fact, is obscured. We do not know its basis. I am saying, we believe that a royalty tribunal ought to re-examine every 5 years, not only for rate structure but for the radical revision of the shape and form of the communications business itself. I cannot look into the future and tell you. I am assuming that the Royalty Tribunal will consist of honest men, fair men, expert men. I am willing to put my trust in them. If they lower rates, and decide that cable is paying too much—I have no basis to say they will not do that, but at least I want somebody that is expert, that is weighing evidence, from time to time to look at the marketplace, because the bill now takes away from me my right to privately negotiate.

Mr. RAILSBACK. I simply wanted to give you a chance to present your side of the case.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman. Thank you, Mr. Valenti. At the outset, I want to point out the obvious; in the past several weeks, you and your colleagues' representatives, have been in my office to see me. The same is true of representatives of other industries which are affected by this copyright bill. So all of this is a final presentation. We are going into greater depth than we had before. None of us are strangers to each other; none of us are strangers to the interests we represent. I hope I can—I usually talk more than I should, but I will try to discipline myself.

I have a few points, rather narrow. I missed the first part of your statement, but you have told me outside of this chamber in other meetings that you and your association are opposed to the proposed basic exemption of $100,000 in gross receipts. Am I right so far?

Mr. VALENTI. Yes, sir.

Mr. DANIELSON. Let me ask you this. Would you comment on the proposal that was made, suggestion that was made to me, that perhaps one way to resolve that threshold royalty fee would be to have a minimum royalty imposed on all cable systems—let us just say for discussion those that come up to $100,000 in gross receipts. Would you comment on that?

Mr. VALENTI. You mean to have a minimum fee imposed on the small systems?

Mr. DANIELSON. Yes; and maybe this is not realistic; just so we have got something to talk about. Let us just say you had $100 a year

for a system up to $100,000 a year in gross receipts. I do not advocate those as being figures of any significant content, but so we can talk about something.

Mr. VALENTI. Mr. Congressman, if this Committee deems that it wanted, as a matter of public policy, to pay special attention to small systems—say those with under $100,000 a year in revenue—and there would be no copyright exemptions of any kind for any cable system, I will tell you quite frankly we would be willing to sit down and try to work out a minimum basic fee for those systems with annual revenues under $100,000; that we would lock in such a fee in perpetuity, if you wanted it that way, so long as nobody got any exemption. If a cable system were under $100,000, it would pay the minimum fee, but if it went up to $150,000 or $200,000 or $2 million, it would have no exemption of any kind, and it would pay under the rate schedule. Yes, Mr. Congressman, we would look at that.

Mr. DANIELSON. I think that is a significant point. Whether or not it is practical, I cannot tell you. But it is significant, at least in view of the fact that when you get down to a certain minimum level of gross receipts, it could be that the cost of administering some of these things becomes ridiculous. You might have a point where we can come to some kind of equitable and practical solution to these problems.

Mr. VALENTI. May I add, sir, may I put a footnote on my response, a caveat; so long as the system with under $100,000 in revenue was an independently owned system, and was not a part of a cable conglomerate.

Mr. DANIELSON. We are only talking about a philosophy here. When obviously, nobody is bound. I am not even bound by the figures I suggested.

Mr. VALENTI. You would find us very flexible on that, sir.

Mr. DANIELSON. I would like to know: we had some fairly pointed testimony yesterday—if you were not here, I am sure your representatives were—on the circumstances under which the so-called consensus agreement was evolved and executed. In fact, I am following up my chairman's question to some extent. Were you, Jack Valenti, personally, physically present at the time that the agreement was presented by somebody within the White House; at the key agreement in which this was presented to them, and they were told that this is it, you take it or leave it?

Mr. VALENTI. First, sir, I was not present at any White House meetings on the consensus agreement. Nobody from the White House called me. I was present at most of the discussions that took place among the three contending groups.

Mr. DANIELSON. That would have been before the agreement was reduced to writing?

Mr. VALENTI. Yes, sir. The principal agent, who was sort of the catalyst for bringing us together, was Mr. Scalia, who was Mr. Whitehead's counsel in the Office of Telecommunications Policy. We met with him several times. But I must, in all candor, tell you that he was courteous, he was helpful, he was not at all coercive.

Mr. DANIELSON. Do you know who from your organization was present, if anyone?

Mr. VALENTI. Nobody, sir, to my knowledge, if you mean the White House. David Horowitz, who has now gone on to other assignments,

was our group chairman at the time. But to my knowledge, there was no White House meeting of any kind that I am aware of. If they took place, I can almost say without any fear of contradiction that none of our people met at the White House. Now, as to what happened with the cable people, I cannot say.

Mr. DANIELSON. Where did you first see the written agreement?

Mr. VALENTI. The written agreement floated like a paper glider between us, between the three parties. Mr. Scalia was presenting various drafts.

Mr. DANIELSON. I mean, after it was reduced—not necessarily set in type, but reduced to its final form?

Mr. VALENTI. We played with innumerable drafts, Mr. Danielson, before it was finally set and signed. I guess we played with dozens of drafts.

Mr. DANIELSON. You do not recall then, when you first saw it in its final form, the form that was signed?

Mr. VALENTI. I am sorry, sir. I do not recall.

Mr. DANIELSON. We did have, as I say, some pointed testimony; and I would like to find some other person or persons who would at least have been exposed to the same circumstances, and test their recollection on it.

Mr. VALENTI. My recollection is that there was not any kind of summit meeting, with trumpets blaring and flags waving. We got a piece of paper that was brought to us, and finally we said—and I cannot tell you the exact date—OK, we will go with this piece of paper.

Mr. DANIELSON. I am going to change points here. In previous testimony before this committee, and referring particularly to yesterday, when a lady in the advertising business was present, she was not the only witness to bring up this general subject. I am talking about the custom in the trade under which copyrighted material is licensed or sold to a radio station, TV station, for example, for use. Let us call that a licensing negotiation for the purpose of this question. The property is licensed to somebody to be used. The advertising lady indicated that this was usually done by people to whom she referred as being syndicators. I gather that these were people who performed a function of a sales representative or license representative. The lady pointed out that for many properties, this was done by syndicators. I think you told us that the motion picture industry does this themselves.

Mr. VALENTI. Yes, sir.

Mr. DANIELSON. Do you do that sort of work?

Mr. VALENTI. No, not I personally, sir.

Mr. DANIELSON. Is there an independent contractor whom you employ for that kind of work?

Mr. VALENTI. No, sir.

Mr. DANIELSON. What I am really asking is, how is it done?

Mr. VALENTI. There are many independent producers of copyrighted material, and because they are small with small organizations, I have no doubt that they contract out to agents who sell their product. Such agents may take maybe 20 independents and sell their products to the local stations. Now remember, syndication sales to local stations, that is what this is; it is not to the networks. You do

not syndicate to the networks. You syndicate to independent stations or network affiliates.

Mr. DANIELSON. Let me interject something. Syndication goes to independents, but network licensing is handled in a different manner.

Mr. VALENTI. Yes, sir.

Mr. DANIELSON. What do you call that?

Mr. VALENTI. As an example, Universal Pictures will sit down with NBC or CBS and work out two different licensing arrangements covering theatrical films and series made for television viewing. One is the full licensing of motion pictures for one, two, or three times showing on a network. Involved is a contract date, an availability date, and a broadcast date. The contract provides how long the network has the right to run that program; once, twice, or three times. That is a simplified version of a sale of films to a network. On a series made for television you work out a deal perhaps to produce a pilot for a network. The network may look at 30 or 40 pilots that they contracted for; and they may choose 4 or 5 of those pilots for inclusion in their next season's network programing.

Mr. DANIELSON. And then the network buys it?

Mr. VALENTI. They license it, and they do it with options, Mr. Congressman. They will pay blank dollar per segment of the series for perhaps one, two, three seasons; or there may be an option to have it for another specified length of time.

Mr. DANIELSON. You mentioned, for instance, Universal would sit down and make this business arrangement. Would Universal—I assume that Universal would buy the copyrightable interest of the artist or the writers, and it would own that interest. Would they retain ownership in the copyrightable interest?

Mr. VALENTI. Almost without exception, they have the copyright, or they have the right to license and bargain in that copyright's name. It is theirs.

Mr. DANIELSON. May I call this type of person the producer?

Mr. VALENTI. Yes, sir.

Mr. DANIELSON. The producer retains the bundle of property. They retain not only—they retain all the copyrightable interest in the production, and the agreement with the broadcasting system is simply a licensing agreement under whatever terms they come to?

Mr. VALENTI. Yes, sir.

Mr. DANIELSON. So you have got two different systems here. You mentioned earlier, in testimony in response to, I believe, Mr. Wiggins, that when you sell a film in a syndicated market, apparently—are you using the word syndicated in a different sense than I have just spoken of?

Mr. VALENTI. Yes. I am using syndicated in the sense that syndication is off-network syndication. We are not then selling to a network. We are selling the film to individual stations, wherever they are.

Mr. DANIELSON. Could you give us the name of some well established, deeply experienced negotiator who sells these films to the off-network market?

Mr. VALENTI. Yes, sir. I would be very happy to give this committee several names of people with long years of experience in this sort of trade.

Mr. DANIELSON. I very frankly would be most interested in knowing how they arrive at the licensing fee, what factors they consider,

and most particularly the geographical distribution factor, the potential viewer factor, the market.

So if you could do that, I will appreciate it.

[Subsequent to the hearing the following material was received for the record:]

MOTION PICTURE ASSOCIATION OF AMERICA, INC.,
Washington, D.C., June 24, 1975.

MY DEAR MR. CHAIRMAN: When I testified before your committee on June 12, Congressmen Danielson and Wiggins requested the Motion Picture Association to make available individuals who actively engage in selling our copyrighted programs to television. The two Members and Congressman Railsback were specifically interested in determining from information provided by such individuals whether our member companies (1) seek additional payment for our program material from a television station because of cable subscribers included in the station's audience rating; and (2) are paid by the station for those cable viewers who may tune in to that station's programs.

After a number of discussions with the staffs of our member companies and with television licensees, I am confirmed in the view I stated at the hearing that we are rarely, if ever, paid for cable viewers. The amount of copyright payment is based on negotiations in the free and open market place. We try to get what the market will bear, and in determining what the market will bear a number of factors are considered, none of which is related to cable viewers.

They may be summarized as (1) supply and demand; (2) the rating of the market, i.e., No. 1, 2, or 50, or 100; (3) the viewer value, i.e., the attractiveness of the program; (4) the predetermined amount to be paid for the program or group of programs which involves the cost of the program(s) including marketing costs.

I am assured that in our negotiations with television networks and with individual television stations (syndication sales), the issue of cable viewers is never mentioned—with one exception. In an increasing number of syndication sales, a television station may refuse to buy a program, or insist on paying a lower price, because a cable television system in the market of the station has imported that program into the market and thus its potential viewing audience has already seen the program, diminishing its value to the television station.

Our witnesses are (1) men who labor in the television marketplace every day selling copyrighted material to television stations, as well as (2) television station executives who buy copyrighted material. These knowledgeable witnesses are prepared to go over, in as much detail as you and your colleagues choose, the actual give-and-take of the marketplace negotiations, so you and your committee can be convinced that allegations of "double payment" are simply not true.

There are a number of ways this can be done. You could (1) hold another hearing and we could present our witnesses; (2) we could have the witnesses prepare and submit statements; or (3) our witnesses could meet with you and members of your subcommittee informally, either in small groups or individually.

Since you already have a full set of copyright hearings now scheduled into July and since additional hearings would further delay consideration of the copyright bill, I hesitate to suggest an additional day of hearings. On the other hand, submission of written statements would not permit questions and explanations of matters that may be unclear or not covered by the statements. My preference would therefore be a meeting or meetings with members of your subcommittee.

We are, of course, anxious to present the requested information in the manner you feel most appropriate. I would appreciate your always friendly consideration in letting me know how you think we should proceed.

Sincerely,

JACK VALENTI.

MOTION PICTURE ASSOCIATION OF AMERICA, INC.,
Washington, D.C., July 7, 1975.

MY DEAR MR. CHAIRMAN: In response to the requests made by Mr. Danielson and Mr. Wiggins, there are submitted herewith affidavits and letters by a number of persons who are personally knowledgeable about the licensing of copyrighted products to television stations and the sale of advertising time to advertisers.

These persons, in affidavits and letters to the Subcommittee, refute completely the charge that so-called "double-billing" takes place, i.e., that television stations obtain additional advertising revenues as a result of cable retransmission of their signals, or that correspondingly copyright owners demand or are paid additional license fees by such TV stations for their product because of the cable retransmissions.

The persons who have submitted the statements that follow are Jim Terrell, vice president and general manager of Station KTVT–TV in Dallas-Fort Worth, Texas; Sheldon Cooper, Vice President and General Manager of Television for Station WGN–TV, Chicago, Ill.; George Koehler, President of Gateway Communications, Inc., Cherry Hill, N.J., owner and operator of WBNG–TV in Binghamton, N.Y., WTAJ–TV in Altoona, Pa., and WLYH–TV in Lebanon, Pa., WOWK–TV in Huntington, W. Va.; John T. Reynolds, President TV Division of KTLA, Los Angeles, California; Crawford P. Rice, Vice President and General Manager of KSTW–TV in Tacoma, Washington; R. Kent Replogle, President of Metromedia Television, New York, N.Y.; A. Frank Reel, President of Metromedia Producers Corporation (a distributor of tape and film programing) New York, N.Y.; James R. Terrell, Chairman of Independent Television Stations, Inc. (the national organization representing independent television stations) New York, N.Y.; Richard Woolen, vice president in charge of programing for Metromedia Television network, New York, N.Y.; Erwin Ezzes, Chairman of the Board of United Artists Television, Inc., New York, N.Y.; H. Keith Godfrey, Executive Vice President of MCA–TV, New York, N.Y.

JACK VALENTI.

JUNE 27, 1975.

Hon. CHARLES E. WIGGINS,
Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN WIGGINS: Mr. John Mercer of your office has contacted me for additional details concerning out-of-market homes reached by television stations via CATV. He was particularly interested in the relationship of advertising rates to film program costs because of the out-of-market coverage.

As previously stated advertisers will not pay for these out-of-market homes. Local advertisers have no interest in people located far from their retail area. National advertiser's buying concept is based on those homes located in the home market of the station (ADI). Additionally there is no accurate way to credit a station the viewing it may receive on a cable system. For example, last year KTVT carried the World Football League Games. Our signal was blacked out by the cable system in Monahans, Texas, because the local station was also carrying the telecasts. This may have happened on other cable systems of which we are not aware. Because of this local station protection, we cannot be sure which of our programs are being carried on cable. This uncertainty further precludes advertisers from paying additional money for cable coverage. Therefore, our advertising rates have not increased because of cable coverage. And, in fact, if cable coverage were eliminated the rates would remain the same since this coverage in no way affects our pricing which is based on the home market viewing audience (ADI).

Nor does cable figure in the price we pay for film program costs. Film distributors base the price they charge for their product on the market rank. The market price for film in Dallas-Ft. Worth, the eleventh television market, will be less than the price in Washington, D.C. . . . the 9th market, but greater than the price in Houston, the 14th market.

I hope this additional information will be of help in your deliberations.

Thank you very much for your interest.

Kindest personal regards,

JAMES R. TERRELL,
Vice President/General Manager.

JUNE 30, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: As reported in the trade press, it appears that cable television witnesses who testified before your Subcommittee on June 11th may have generated some erroneous impressions relative to the value which a station derives from extension of its signal to cable subscribers residing beyond

the station's normal over-the-air coverage area. I hope this letter will serve to correct those impressions.

To the best of our knowledge, WGN–TV is currently carried on 170 cable television systems whose subscribers total 576,000. Approximately 142 of these systems, with a total of 490,700 subscribers, are located beyond the Chicago Area of Dominant Influence. This area, known as the ADI, represents those counties wherein the Chicago television stations have a preponderance of television viewing.

Without going into detail regarding the methods used in the buying and selling of television commercials, I would like to advise you that the price of advertising purchased on our station reflects only the homes we reach within the Chicago ADI. We do not receive extra consideration by virtue of those homes beyond the ADI which are reached via cable television.

I will be pleased to discuss this further with any members of the Subcommittee or their staffs.

Sincerely,

SHELDON COOPER.

GATEWAY COMMUNICATIONS, INC.,
Cherry Hill, N.J., July 9, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: My attention has been called to certain testimony made by spokesmen for the cable systems during the hearings on copyright legislation before your Subcommittee.

Cable protagonists have stated, unequivocally, that cable so enhances the quality of local signals and so extends local signals beyond normal coverage areas that local stations benefit from the added coverage, and therefore cable systems ought not to pay copyright fees, but on the contrary, they should collect fees from local stations to compensate the cable systems for improving and extending television signals.

That claim is preposterous.

In certain locations it is possible that local signals have been "enhanced" but when it happens it is an improvement less apparent to the eye and mind than to the meter of the measuring device. In my area of operations, the television signal may be extended for the cable viewer in Williamsport, or in similar physically shaded areas where normal station signals cannot be received. This is the classic cable situation.

But the argument is wholly fallacious that this "service" by the cable systems permits the station to charge more for its advertising and thus enables the syndicator to charge more for his copyrighted program.

Virtually all television advertising buying is done on the basis of station reception in what Nielsen calls the Designated Market Area, and the American Research Bureau calls the Area of Dominant Influence. These are the areas in which the stations in a market command the attention of a majority of the viewers (county-by-county) and is, as a practical matter, well within the coverage area of the station's unassisted signal.

Each DMA (ADI) is defined by viewer response to television stations in a market. From an advertising selling viewpoint, much of a station's unassisted signal is "wasted" because it is broadcast over areas where a majority of television sets are tuned to stations operating in an adjacent market.

The Johnstown/Altoona area offers an excellent case in point, when one considers the degree of cable saturation—nearly 55%—and the number of cable connections—about 150,000. In combination, the Johnstown/Altoona market becomes the biggest and toughest cable market in America.

"Television Fact Book" shows that the Johnstown television station, WJAC–TV, has a net weekly circulation approaching 600,000 television homes. The Altoona station has a net weekly circulation of under 300,000 homes. But, "Broadcast Advertiser Reports" (the authoritative source on TV advertising), shows that most national business is placed on the Altoona station, WTAJ–TV, despite the fact that Johnstown has a two to one total coverage over the Altoona station.

Superior selling may account for some of the difference, but the simple fact is that most buying is done on DMA or ADI figures and in the DMA or ADI, the Altoona station, WTAJ–TV, in a majority of time periods, has the audiences equal to or larger than the Johnstown station.

On the other hand, the Johnstown station's physical coverage over Pittsburgh is "wasted" in the sense that advertisers buying the Johnstown/Altoona market also buy the Pittsburgh market separately; they buy by DMA or ADI and not by total coverage of the station.

The local merchant doing business in Johnstown or Altoona has no desire to pay more advertising dollars to reach viewers in Pittsburgh: his store is in Johnstown or in Altoona, and he'll not pay more for a signal that competes with the signals used by Pittsburgh merchants—who are "local" merchants for Pittsburgh area residents.

Where and how does cable help the Johnstown/Altoona television stations? The answer is that cable doesn't help them; it hurts. There has been no ABC–TV affiliate in either Johnstown or Altoona. Cable brings in to both cities the signal of WTAE–TV in Pittsburgh, a station that is 75 to 100 miles away from Altoona and the area served by its station. The Pittsburgh station can't sell this coverage, but the viewers watching the programs, obviously are not watching the signals of the Altoona or Johnstown stations. Consequently, these audiences for the Altoona and Johnstown stations are diminished rather than increased. In short, cable has fractionalized the local viewing audience.

Or, look at Binghamton, New York, and audience survey records going back to November 1963. The share of audience viewing signals other than those in the market has risen from 2% in November of 1963, to 25% in May of 1975, and it has gone as high as 30%. The total number of homes attributed to the Binghamton market has gone from 43,000 in November of 1963, to 51,000 in November of 1966 but sharply down to 38,000 in May of 1975. In a time when the number of television homes was increased and the population was increasing, the Binghamton stations have had to run at full speed in order to remain in approximately the same place. The reason? The growth of cable systems in the area, systems that import three signals from New York City 200 miles away and additional signals from Syracuse and from Wilkes Barre-Scranton.

The total homes here cited is from 9 AM to midnight, 7 days a week. The prime-time situation is even more revealing. In 1963–1965, the number of homes viewing the three Binghamton network stations ranged around 90,000. At the height of the last television season, 1974–1975, the number had dropped to as low as 69,000.

On the purchase of syndication copyrighted product for use on television stations, the distributor prices each market according to its size. From that point on, the price the station pays is negotiated.

Prices for copyrighted programs are negotiated on the basis of competition between sellers, on what a station operator feels he can afford, on the going price in the market for similar programs, on the quality of the product under consideration, on the number of stations in a market, on the length of time that the program has been available. These are among the more important factors that are the determinants of price for program material; not the size of the station's audience. Thus, the DMA or ADI is seldom, if ever, a measure of price paid and the total service area is of even less significance in such price discussions.

The syndicator may sell the same product in adjacent markets—the Pittsburgh/Johnstown/Altoona situation again. If he sells the same program in the two markets and the Pittsburgh station is carried by cable in Altoona and Johnstown, one may find that the Pittsburgh station is taking away audience with the same program for which the Altoona station has paid good dollars. At the same time, the Johnstown/Altoona audience is an audience that the Pittsburgh station cannot sell in formulating its rates. Meanwhile, the Altoona station is forced to sell at a lower rate because the program coming into the market via cable has eroded part of the Altoona station's audience.

Cable's claim that its enhancement of local signals and its extension of those signals in additional homes should make it exempt from copyright payment is not based on the facts and is not deserving of serious consideration, in my judgment.

Sincerely,

George A. Koehler.

Golden West Broadcasters,
Los Angeles, Calif., July 14, 1975.

Hon. Robert W. Kastenmeier,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: I have been asked as General Manager of KTLA, an independently owned television station in Los Angeles, California, to comment on

whether or not we consider the number of cable subscribers to whom our programs are carried in determining the price we will pay for programs which we acquire from other parties.

In my experience, the question of the number of cable subscribers has never been an element in determining the price paid for such programs, nor is it an element in determining the prices we charge our advertisers for advertising on our station. This is so for primarily two reasons. The cable television audience is so negligible in comparison to the total available audience that it is not measured in considering prices charged or prices paid.

In addition, the rating services which report the number of viewers a particular station has within its area of dominant influence in order to afford comparisons with other stations, do not include in their calculations or statistical research a separate number for cable viewers. The advertising rates we charge are based on the reports of such statistical surveys. Since the number of cable viewers is not included in the statistics, it is not an element in the determination of advertising rates.

I can remember no instance in which the number of cable viewers ever became a subject of a pricing discussion with a motion picture product supplier, or in any discussion of our advertising charges with a potential advertiser.

Yours very truly,

JOHN T. REYNOLDS.

KSTW TELEVISION CHANNEL 11,
Tacoma, Wash., June 19, 1975.

Hon. ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: I have followed with interest press accounts of hearings by your subcommittee on the question of copyright liability by cable television. A major contention put forward by cable interests is inaccurate, and should be corrected before your committee begins its deliberations.

The cable people have attempted to create the impression that, by carrying television signals beyond the area a TV station would normally cover itself, cable expands the station's effective market. This, they say, enables the station to charge higher advertising rates, which in turn results in higher copyright payments. I do not deny that most station operators wish this were the case. Many of us have even labored to achieve that very goal. But the fact of the matter is that it doesn't work that way, nor is it likely to in the foreseeable future.

Television advertising rates are determined by the size and composition of the station's audience. There are only two generally accepted means of measuring that audience, and those are the regular audience surveys, or ratings, issued by the A. C. Nielsen Company and the American Research Bureau. Both those companies will admit that they cannot accurately credit to each station the viewing it may receive on every cable system far from the station's home market.

Even if the rating services could, and did, fully and accurately credit such "outside" viewing, the station's advertising rates would not automatically rise in a commensurate amount. About half of an average station's revenues comes from local advertisers, retailers in the station's home community. Additional viewers hundreds of miles away are not a market for them, and they will not pay higher rates for the privilege of exposing their messages to these far-away people. The other part of station advertising revenues come from national advertisers, whose products presumably are available almost everywhere. But even they won't pay higher rates for that possible extra audience, because their buying concepts and criteria are based on the audience delivered in the so-called "Area of Dominant Influence," or that area close in to the station's home market.

I realize that this is a highly detailed and technical concept, but it is necessary to understand it in order to refute the cable interests simple assertion that because of their additional coverage, broadcasters are charging higher rates and paying additional copyright fees. That just isn't so.

I hope you will call this to the attention of the committee's membership and staff, so that complete information can be elicited. Thank you very much for your time and consideration.

Sincerely,

CRAWFORD P. RICE,
Vice President and General Manager.

METROMEDIA TELEVISION,
New York, N.Y., June 26, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: During your recent hearings on CATV Copyright before your Subcommittee, witnesses representing Cable Television have presented testimony concerning the sales value of out-of-market homes reached by television stations via cable. Our experience, which does not confirm the cable viewpoint presented, may be helpful to you in your consideration of this matter.

Metromedia Television operates six television stations, five of which are independent—that is not affiliated with any major network.

Both local and national spot advertisers in the past have not had any significant interest in reaching any distant home outside of the market which may be receiving their message via cable. If indeed they were interested, they have not been willing in the past to pay higher rates for any additional viewing homes.

In fact most local advertisers are interested only in reaching viewers in the metropolitan area in which they conduct their business recognizing that customer potential from distant homes is minimal at best.

National and regional advertisers plan their advertising expenditures in spot television based on the ADI (Area of Dominant Influence). Therefore, cable homes falling outside the ADI simply are not a factor in the price they are willing to pay.

The cable coverage also has no bearing on the price that stations pay for its programming. Just like the national advertiser, the program syndicator establishes his price based on the size of the market not on the individual coverage of one station or another due to the number of cable systems on which that station is carried.

If I can be of further assistance, please do not hesitate to call on me.

Very truly yours,

R. KENT REPLOGLE, *President.*

A. Frank Reel, being duly sworn, deposes and says:

I am the President of Metromedia Producers Corporation, subsidiary of Metromedia, Inc. My Company distributes tape and film programming to television stations.

Among other activities, Metromedia, Inc. is engaged in the operation of six television stations in major United States television markets. Five of these operate as "independents"—i.e.: without network affiliation. The signals of these stations are widely retransmitted by CATV to both local and distant cable audiences.

I make this affidavit so that it may be submitted to the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary of the House of Representatives in connection with its hearing of the bill H.R. 2223.

The question to which I address myself is whether a television station pays a higher fee to the copyright owner for the licensing of a television program because of the fact that the signals of the licensed station are retransmitted by cable systems operating in the local market of the television station or are carried into markets distant from that of the television station in order to be distributed to the cable system's subscribers in that distant market.

Based on my knowledge of the industry as it has operated for years and operates today, I can state that no such higher payments are made to the copyright owners and that the license fee paid by the television station does not reflect in any manner the extended audience provided by distant cable systems.

My experience in this field goes back to 1954 when I became associated with a company then known as ZIV Television Programs, Incorporated. That company was acquired later on by United Artists Corporation, and after going through several changes of names ultimately was called United Artists Television, Inc. The business of ZIV and United Artists Television, Inc. was the production and distribution of television programming. I was basically in charge of overseeing all contracts on the talent side, the production side, and on the

distribution side. I stayed with that company until July 1968, at which time I joined my present company, Metromedia Producers Corporation. I first became Vice President for Business Affairs with duties similar to those I exercised for ZIV Television Programs, Inc. and for United Artists Television, Inc. I then became Executive Vice President and then President of Metromedia Producers Corporation.

My major concern today is supervision of licensing to television stations. The programs that my Company licenses to stations are either owned by my Company as copyright owner or it has received the rights from the copyright owner to distribute or to license programming produced by others.

When a station acquires a license, it is important for that station that it be the only one in the market to exhibit that program and that the same program cannot be seen—with different commercials—over another station or imported from another station by a cable system in the licensee station's market. The station demands exclusivity. For that reason we never license the same program (or even different programs of the same series) to run on two or more stations in the same city at the same time. This concept is applicable to cable importations. The obvious reason is that when a cable system imports a distant signal carrying the program that we want to license to a local station, the audience of the local station will be reduced by the number of viewers who see the program on the cable.

The syndicator must sell the big markets first to recoup his costs and then he must turn to the small markets to make a profit. If the cable system carries the program from the bigger markets to the smaller markets, syndication therein becomes difficult because cable importation reduces the value of the program to the buying station. As a result of this harmful effect, a television station may refuse to license a syndicated program or may license it only by paying a lower price than otherwise because its potential audience has been or will be exposed to the program albeit with different commercials.

I have been informed that cable interests have contended that the loss which the copyright owner suffers in the local markets may be counterbalanced by increased license fees which he might receive from the television stations whose signals are carried into the distant markets by CATV. I understand that it has been asserted that the dollars lost for a program in the local market will be made up by those paid to the copyright owner by the station whose signals are carried into the distant market, because the license is bought on a "dollars per thousand viewers" basis. In the first place, the "viewers" are those measured by a rating service within the area dominated by the station—not some distant location. In the second place, a distant audience is not valuable to sponsors, such as local and regional advertisers or even to national advertisers to whom partial duplication of coverage in a market does not justify increased costs. Advertisers are value conscious and will not pay for wasted coverage or for coverage that is not measured by audience ratings within the immediate market area.

But most important, the economics of determining the price between the copyright owner and the licensee station is based primarily on the semi-monopolistic economy in the television market. There are only a limited number of stations in each city and (with the exception of the small number of cities that have independent VHF stations) on the average buying stations, the all-important time left for non-network programming is severely limited. Accordingly, since many programs compete for sales to such limited outlets and there is always more product than time available for syndicated programs, there exists a perpetual and structural "buyers' market" that is not and cannot be affected by increases in coverage due to CATV.

The inevitable consequence of these economic factors is that stations obtain programs at the lowest possible price and do not make any additional payments by reason of the fact that there may be some additional viewers far away in another market. In my 20 years of experience, I have never encountered any such increased price. The only time CATV audiences are discussed is when a buyer seeks to depress the price of a program because a part of his potential audience has already been exposed to the same program or series by CATV.

A. Frank Reel.

Subscribed and sworn to before me this nineteenth day of June, 1975.

Robert L. Drossman, *Notary Public.*

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
New York, N.Y., June 17, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: It is my understanding that during last week's hearings on CATV copyright before your Subcommittee, witnesses representing the cable television industry presented testimony concerning the sales value of out-of-market homes reached by television stations via CATV. Hopefully, the following information will be of assistance to you in your deliberations.

It is true that the Association of Independent Television Stations (INTV) has sought to interest advertisers in purchasing those out-of-market cable subscribers reached by independent television stations. As depicted in this week's issue of Broadcasting magazine, the cable industry actually displayed copies of the coverage maps which INTV uses in its sales presentation.

However, it is significant that advertisers will not pay for these out-of-market homes. First, local advertisers have no interest in buying homes at such a distance. Second, national and regional advertisers are interested only in those homes located within the market (this area is known as the Area of Dominant Influence (ADI)). Homes outside the station's ADI simply do not figure in the price of the advertising. It may be that in certain cases an advertiser may select an independent station over a competing network affiliated station owing to the extension of the independent's signal via CATV. But this factor does not affect the price which the advertiser pays for the station's time, be it an affiliated or independent station, and it does not affect the price the station pays for its programming.

The foregoing information was confirmed in discussions with several other members of our association, located in both large and small markets. If I can be of further assistance, please do not hesitate to call on me or the President of our Association, Mr. Herman Land, at the above address.

Very truly yours,

JIM TERRELL, *Chairman, Board of Directors.*

Richard Woollen, being duly sworn, deposes and says:

I make this affidavit so that it may be submitted to the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary of the House of Representatives in connection with its hearings on the bill H.R. 2223.

I am Vice President in charge of Programming for Metromedia Television. In that capacity it is my duty to purchase syndicated and other television properties for the six television stations owned and operated by Metromedia, Inc. These stations are WNEW–TV, Channel 5 in New York; KTTV, Channel 11 in Los Angeles; WTTG, Channel 5 in Washington, D.C.; WTCN–TV Channel 11 in Minneapolis-St. Paul; KMBC–TV Channel 9, in Kansas City; and WXIX–TV Channel 19 in Cincinnati. KMBC–TV in Kansas City is an affiliate of the ABC Television network—the others are independent stations. WXIX–TV in Cincinnati is a UHF station—the others are VHF stations.

I have been engaged in the process of purchasing programming for the Metromedia owned and operated stations for over 9 years. During that time I have never been moved to increase the price of any programming by reason of the fact that signals of our stations are carried into distant areas and disseminated by CATV. Nor have I been party to any negotiations for the purchase of programming which were based in any way upon a consideration of the fact that our stations' audience includes coverage of distant areas by cable.

A discussion of the fact that our signals are carried on cable systems has never arisen in any negotiations for any programming—that I have conducted.

RICHARD WOOLLEN.

Subscribed and sworn to before me this twenty-third day of June, 1975.

ARNOLD L. WADLER, *Notary Public.*

UNITED ARTISTS TELEVISION, INC.,
New York, N.Y., July 7, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: The undersigned is the Chairman of the Board and Chief Executive Officer of United Artists Television, Inc. My company is actively engaged in the distribution of motion picture feature films and series to television stations throughout the United States. I am writing this letter to comment on testimony given by witnesses for the cable industry at last month's hearings before your Subcommittee regarding the license fees paid by television stations for copyrighted programs.

I am fully familiar with the distribution of motion picture feature films and series to television stations, having been actively engaged in that business since 1950. My activities in this respect included and still include the negotiation of license contracts with networks and television stations. One of the important subjects of these negotiations is, of course, the price which the licensee pays. In my experience, there is no increase in price which the television station will pay because of cable retransmissions. The reasons why the station will not pay a higher license fee are inherent in the operation of the television program market. Indeed, where licenses to networks are concerned, the network acquires the rights for the whole United States, and it would not pay more money for cable retransmissions, especially since the network's affiliated stations are faced with competition for their own local spot commercials when the same programs are imported by CATV with the local spot commercials of the distant station.

Insofar as licenses to stations for non-network (syndicated) showings are concerned, it is perhaps a platitude to say that price is determined by what a buyer is willing to pay and what a seller is willing to accept. But the reality of the marketplace is that many factors enter into this determination, particularly in view of the intangible and speculative element of public response to a particular program or group of programs. Cable carriage enlarging distant audiences plays no part in that price determination at all.

The primary determining factor in arriving at the amount of license fees is supply and demand. When there are more stations in the market, there are more bidders for the program and, accordingly, the price will be higher. Other factors influencing the price are the availability of programs for licensing to stations in that market and the need of the station for the particular program or type of program offered to it. This in turn depends on licenses recently offered or granted in the market by competitors of the program supplier.

For the reasons explained, it is misleading to say, as I understand cable interests have done, that the copyright owner is being reimbursed for his losses in local markets by additional payments by stations for distant signal retransmissions by CATV. The contrary is true. The copyright owner loses local sales to stations without being able to recoup his losses from the stations whose signals are carried to the distant markets.

Respectfully yours,

ERWIN H. EZZES.

MCA TV, AN MCA INC. CO.,
New York, N.Y., July 10, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: I have been advised that cable television witnesses appeared before your committee last month and claimed that television stations pay higher copyright royalty fees to copyright owners because television signals are carried by cable systems into additional homes.

As Executive Vice President and Director of Sales for MCA TV (a major distributor of copyrighted programs to television), I have a great deal of experience in selling our programs to television. I cannot recall a single negotiation in which the number of cable subscribers in a market was an issue or factor in

price of the product. When I am negotiating a contract with a local television station for the use of our programs (syndication), I have no idea of the number of cable homes in that local market, and today I couldn't tell you, if you asked me, the number of cable homes in any market.

The reason simply stated is that the number of cable households viewing a television program is irrelevant in our negotiations with television stations. In determining a sale price and negotiating with a local television station we analyze the following: the past history of selling programs in that particular market; the ranking in size of that market (New York is No. 1, etc.); competition in selling programs to stations in the market; our costs in the programs we're attempting to sell; and the needs of a television station for programming. Thus, for example, if a television station has a low rating, and we have what we think is a good program which will help his ratings, we may ask a higher price. The station may pay the higher price, if it needs our program, for just that reason. The sale price has no relationship to the number of increased cable viewers: it is based on the marketplace.

If increased cable subscribers had an effect on the contracts we negotiate, then as the number of cable viewers increased, our sale price should also increase. This has not happened in the case of films we sold on a syndication basis in December 1972 in comparison with the sales of films in the same markets in January 1969. Following is a table showing the approximated changes in 1972 sales prices over 1969 prices in the fifteen largest television markets that had from 3% to 19% cable household penetration:

Market:	*Percentage change in price*
New York	+3
Los Angeles	+4
Philadelphia	+4
Boston	−4
San Francisco	−16
Washington, D.C	−16
Pittsburgh	−1
Cleveland	+6
Dallas-Ft. Worth	+3
Minneapolis-St. Paul	−40
Houston	−11
Seattle-Tacoma	−11
Atlanta	−35
Indianapolis	−4
Tampa-St. Petersburg	−1

During this period, television homes increased nationally by almost 9% and cable subscriber households increased nationally by 66%. Additionally, during this same period there was a continuing, high rate of inflation. Yet in those few markets where we obtained price increases for our product, the increases ranged only from 3% to 6%. Indeed, in most of those markets, we experienced no changes in prices or else reductions ranging from 1% to 40%. While such price changes can be explained in part by the quality and number of films offered for syndication, it is obvious that the number of cable viewers has no effect upon the price negotiated. What counts is the program we offer and the specific marketplace situation.

I must add that the "leasing" of copyrighted program material involves complex issues; it is not the same as selling bolts and nuts. I have touched only on the high points and have perhaps over-simplified in the interest of brevity. I would be pleased to make myself available for a fuller explanation and to respond to any questions you and the Members of the Subcommittee might have. I must repeat, however, that neither I nor any other seller of program material to a television station, that I know of, has ever obtained more money because of additional cable system coverage of that buyer's signal.

Respectfully,

KEITH GODFREY.

Mr. DANIELSON. I have one last question. This is really sending up a trial balloon. I would like to have you take a look at it, though. We are talking about a tribunal. It comes up all through this testimony,

as I sense it now, when we are talking about cable and the motion picture industry because, really, these are the contenders in our current discussion.

The issue is this. The cable people contend that they should not pay a copyright royalty because if they did so they would be the victims of, let's say, buying two tickets to the same show or double-dealing, those very terms that come up here, the theory being that a copyright license fee has already been paid indirectly through payment to the broadcasting system.

If there really is double-billing—I am going to use that as a frame of reference—if there is really double-billing, of course, I think a good argument can be made that that would be inequitable. A person should not get paid twice for the same thing.

On the other hand, you and persons similarly situated tell us that that is not the case at all. The cable people are getting something for free, for nothing. And very frankly, if that is true, that is not equitable.

I can see both sides of that. The issue is this: Are they or are they not getting something for nothing? Are they or are they not being double-billed for the same thing? I am not so sure that this committee or the Congress is a proper organization to decide an issue of fact, which is: Are they or are they not being double-billed?

Maybe that should be the issue to be decided by the tribunal. I am telling you this is only a trial balloon I am sending up. Suppose we do put out this bill. Suppose it is passed. It becomes law. Suppose we restructure this bill to condition the jurisdiction of this tribunal giving them the power and the responsibility of making a determination as to whether or not there is double-billing, to provide that they cannot permit double-billing. But there at least you would have a tribunal which could sit as a court and determine an ultimate fact of whether you have double-billing. There is a new proposition.

Take a swing at that.

Mr. VALENTI. The proposition you have posited is that a local station has licensed a film and paid a copyright fee to exhibit this particular film locally. Cable picks it up, says OK, the station has paid us for it, now I am going to pick it up and show it to other people. I am not liable because the station already has paid the copyright fee, and if I pay the copyright fee, it would be double payment.

That is what you have.

Mr. DANIELSON. Not quite. I think the tribunal would have to make a determination of whether or not that is a fact, a finding of fact. For example, if the syndicator in licensing the film to the station were to crank into his license fee the fact that you are not only showing it in New York City but also in Oswego, I think was the town. If that is already bought and paid for that is one thing.

On the other hand, if it is not bought and paid for, that is quite another thing. And very frankly, I would like to know the answer to it. I do not doubt your word. I do not doubt the word of the other ladies and gentlemen who have been here. But frankly, the position we are in is not resolved. I question whether the legislature can resolve it. I think it requires a judicial type of determination.

Mr. VALENTI. I have to go back to bedrock basis, Mr. Danielson. There is something repugnant in the fact that a man can build a

business and make a lot of money and the product he sells to the public is something that he gets for free. He does not pay for it. Somehow or another I recoil from that. It seems wrong.

Mr. DANIELSON. Let me coin a new expression and say I associate myself with your remarks.

Mr. VALENTI. Let me give you two examples. Let's suppose that Channel 9, which is CBS here, is running a motion picture in Washington. CBS paid a copyright license fee for it. They sold advertising to go with the program and it reaches out all over the country, and the advertiser is paying for that coverage. Let's suppose Channel 7, ABC, in Washington, said "that's the most marvelous film in the world. It is a 'Gone With the Wind.' We are going to run it on our Channel 7, but we do not have to pay anything for it because this copyright has already been paid for by CBS and Channel 9. We are merely enhancing the audience."

Mr. DANIELSON. Mr. Valenti, I have not communicated with you because that is not what I am talking about. Believe me, I want your people to get every dollar of licensing that they are entitled to. I really mean that. And I also want cable to pay for it if they are getting it. I want the TV stations to pay for it if they are getting it.

But after having had several days of testimony here, it looks to me like the nut is are you paying twice or are you getting it free?

I wish I knew the solution.

Mr. VALENTI. Let me ask the question back to you, Mr. Danielson, because if this premise is wrong, I guess the whole problem of copyright becomes tattered and unraveled. I have been told by expert lawyers that the basic concept of copyright is separate payments for multiple use of a copyrighted product, whatever that product is.

For example, a novelist writes a book and a motion picture company pays him for it, a paperback publisher pays him for it, a book club pays him for it. If a play is made out of it, the producer of the play pays him for it. It is multiple use.

Mr. DANIELSON. You could not get a quarrel with me on that if you tried. I will tell you what. Here is where we are.

Under the present posture of the hearings on this bill the Congress is being asked to make this factual determination of whether or not the copyright owner is being appropriately compensated for his property. My proposal was only that instead of having this committee and the Congress make that determination, why not set up a tribunal which is able to hear evidence, to question witnesses, to examine evidence, to make a factual determination like any other court.

It is just a matter—I do not think—I think that as a legislative function this is pretty difficult. I am willing to fight it out but it is pretty tough.

Mr. VALENTI. I am under the impression, Mr. Danielson, that the very official body of cable is already past that threshold question. They admit they are liable for copyright. They testified so before you.

Mr. DANIELSON. They admit that they are liable for copyright under some circumstances. They deny they are under some circumstances.

Anyway, that is my question. I hope that others may give me a response on that as time goes by.

Mr. VALENTI. I will respond with the names of those people, sir, that you asked about.

Mr. Danielson. Thank you.

Mr. Kastenmeier. I might say this question has been before Congress for a decade or so. To recoin an old phrase I think on that question, "The buck stops here."

Mr. Valenti. Yes, sir.

Mr. Kastenmeier. Whether we like it or not. I yield to the gentleman from California.

Mr. Wiggins. Yes. On the factual question raised by Mr. Danielson. It is troubling not to know what the truth is. It would be very helpful if we knew the truth but I suspect that there is not a single truth. I suspect that in some cases a copyright owner is paid for by reason of the expanded cable market. I suspect in other cases he is not. If we have to litigate this question, we would have to do so on an ad hoc basis, literally with every showing.

I think we are probably going to have to make a judgment that it is or is not more probably true in most cases. In other words, we are going to have to put a blanket on this whole thing and recognize that in some cases it might result in a double payment and in other cases it might not.

I do not want to foreclose any final judgment on this idea but I recoil at the notion you are going to have to file a lawsuit every time you sell a copyrighted work to determine whether or not the market did, in fact, in that case include the expanded cable coverage.

Mr. Valenti, I am tempted to spar around with you a little bit just for the exercise, but I will not yield to that. I do wish to add my personal interest in the names and testimony of people who will be furnished by you bearing on this question.

Mr. Valenti. I will do that immediately, sir.

Mr. Wiggins. I yield.

Mr. Kastenmeier. The gentleman from Massachusetts.

Mr. Drinan. Thank you, Mr. Chairman.

Mr. Valenti, I might as well put out some of my biases, but I want to diversify television. I think it is outrageous that we have all three television networks at 7:00 with the news, depriving members of Congress of the opportunity, and when I try to get NBC, Channel 11, from Baltimore at 6:30, it is very unclear. I wish there was some cable company out there. I have cable in my Congressional district for people who cannot get Boston television and only 10 percent of this community in northwest Massachusetts that subscribe, but it is a service to them, and I wish more of them had this available.

My impression also is that the cable industry does not deserve the tongue-lashing they received this morning. They are very aggressive and they are trained to get their product to more people. And I just have the impression that the existing networks and the establishment, so to speak, the biggies, are using copyright as a way to keep cable from being a severe competitor.

You admit you are passionate about these fees, then you say on the other hand that they are small anyway, they are not going to do any harm to the cable industry.

If they are that small and insignificant, why all the fear and the passion? Pay television, too. I spend at least $1,000 a year on magazines and books to get information. I am willing to pay. I want 30 channels every night. I want to be able to get the San Francisco Symphony, if that is what I want.

I think the Congress should take as its basic bottom line, basic major premise, that we want to diffuse knowledge that is totally consistent with copyright and yet I am being pressured here by all types of establishment people to say that let's restrict the diffusion of knowledge because of this sacred thing called copyright.

I come back to some specifics. If the cable company in Massachusetts transmits only as an antenna and does nothing further, why should they have to pay copyright just on that assumption. They do nothing except have a super antenna.

You indicated you are for family choice television. I am for I will not say family choice television, I want a diversity of television. But suppose this particular cable company does nothing except a mechanical function. That is all they want to do. Why should they have to pay television to a channel in Boston to give the people a clear picture?

Mr. VALENTI. If they were doing that as a charitable gesture, if they were doing this in the public interest, if it was a nonprofit organization doing it in the public interest, I might probably say wonderful. I think that is a marvelous thing they are doing, bringing to the people of some part of Massachusetts who cannot get good television reception. But when it is being done for profit, when he is making money out of a business that he is building, when he is building his business on somebody else's product, it seems to me basically wrong that he would not pay even a modest fee for the use of that property. No one else is giving the cable system, Mr. Congressman, anything, not a thing, and the Congress is not asking the telephone company to exempt him paying rent for cable he puts on a telephone pole because it is "in the public interest."

Mr. DRINAN. Pretty soon, Mr. Valenti, we will have a little antenna you can buy. In fact, there are these ads that you buy this and you will get these sets. If I happen to buy that if they perfect it, you mean I am supposed to pay the copyright if I am in Massachusetts and pick up a Boston station?

Mr. VALENTI. No, sir.

Mr. DRINAN. They are selling these things and managing them for you.

Mr. VALENTI. But you are not selling it as a profitmaking business. If you go out into the business of selling these antennas, I do not know what the law is but we will sure as the devil investigate it to see if you were tramping on our property rights.

I do not make the copyright law in our country. We are trying to live under it. It seems to me it is right and proper that whatever product you make, whether it be this table or one that emerges from your brain, that is property and that you ought to be paid for anybody that uses it. That seems to be basic. I do not want to collide with your sense of justice or your sense of public service because I ally myself with you on that. But I have to say that there ought to be some dimension. I cannot believe that a man can go into business, make a lot of money, and get a free ride. You are not talking about housetop antennas when you are talking about Teleprompter.

Mr. DRINAN. No, sir. This is my first hypothetical that for the mechanical assistance that is given to people out there in the nonurban areas, there are millions of people who are not getting—very little diversity and not even getting television stations from a major market.

And that just the mechanical thing, I think that question might be solved pretty soon if somebody works at it so you will not have to go to the cable. You will just have better television sets or better production and better radiation.

Why is the McClellan fee so—how is that determined and how much would it bring to the industry and why are you fighting for it so vehemently?

Mr. Valenti. It is the best that we have. The McClellan fee came into being arbitrarily. I am told by the members of the Senate committee that it was not founded on any economic data of any kind but it was literally plucked out of the air.

Mr. Drinan. This is just as arbitrary as the Gurney.

Mr. Valenti. Yes, sir.

Mr. Drinan. So how can you defend one or either or both?

Mr. Valenti. Well, sir, if we go back again to the consensus agreement, we opted in the very beginning for no fee schedule at all but to let arbitration tribunals start off immediately and find out what the facts were and then set fees. We are going along, Mr. Congressman, because that is the way the world is. We have a bill here that passed the Senate once and we think that if there was no reason to have a fee in the first place, then there is no reason to cut the fee in half. We are just saying the fees seem almost so low as to almost not be fees.

I pointed out that arithmetic of the fee schedule is 3 cents, the equivalent of 3 cents per subscriber per month for 70 percent of the systems in this country.

Probably the one you have in Massachusetts.

Mr. Drinan. On the consensus agreement you say, Mr. Valenti, in your larger statement on page 45 that the cable operators now claim that the consensus agreement is dead. Did you not gather that yesterday? Would you not want to expatiate on that?

Mr. Valenti. We urged the cable people to go with us to Senator McClellan, to join with us and the broadcasters, and tell Senator McClellan the consensus agreement insists that there be no fee schedule in the bill unless and until we cannot privately agree. We do not privately agree on appropriate fees, therefore we ought to go with the arbitration tribunal. They refused to do that. They would not go along with us.

Mr. Drinan. Is it fair to say that the cable people say that the consensus agreement is dead?

Mr. Valenti. I do not know whether they have put it in writing but by their very actions they have made it very clear that it is dead since they are not abiding by the arrangements that were made in the consensus agreement and they would not go with us to the Senate to make known this unified position of the three contending parties.

Mr. Drinan. I get the impression that they are fighting very hard, as is their right and duty. They are very aggressive. They have gone to the Supreme Court twice, and that they want to import these signals from the so-called superstations, as you put it, on page 47—New York, Chicago, Los Angeles, and frankly, I want to get those superstations. I do not want to be restricted to four or five stations in Washington. That is my bias and I put it out there. I want to encourage television, the cables, I want to protect copyrighting in the constitutional sense. I do not want distortions of it.

I thank you and I am sorry, my time has been consumed. It is a very fascinating presentation. Thank you.

Mr. VALENTI. Thank you.

Mr. KASTENMEIER. The gentleman from New York, Mr. Badillo, for his biases.

Mr. BADILLO. I do not think we have enough time for those. I do think, however, that we have to make a distinction between the question of deciding whether or not there should be a copyright and the question of deciding how the fee for that copyright is to be set.

I believe that on the question of deciding on a copyright, whether there should be a copyright, that is our responsibility as Members of Congress, and in fact, that is what the Supreme Court has said.

I think that I for one am prepared to make that decision. However, assuming that we decide there should be a copyright, the question then comes up how we decide or if we decide, what fee should be paid for that copyright.

Yesterday, when the cable television people were here they said that it is impossible to leave the question of the fee to be paid to the normal forces of the market place because the nature of the transmission business is such that the cable people really would be in an impossible bargaining situation.

What is your reaction to that claim?

Would it be possible for us to merely say that it is a copyright and then leave the question of the amount to be paid to be settled in the marketplace?

Mr. VALENTI. In all honesty I have to tell you that I think there would be administrative difficulties in the free play of the marketplace. That is what the compulsory license was created to avoid such an administrative difficulty; a compulsory license covering all signals, lessening the paperwork, lessening everything.

Mr. BADILLO. If we agreed that the fees should be set by some mechanism to be decided upon by us, why do we have to have any fee at all. Why can we not simply say that there shall be a fee and then the fee shall be set by the impartial tribunal and let the question of the fee be determined by the impartial tribunal after listening to the presentations and examining the books and looking at financial statements. What would be your reaction to that proposal?

Mr. VALENTI. It is here in the consensus agreement, that was our original position, sir. It is precisely what we said.

Mr. BADILLO. In other words, your preferable decision is that rather than the McClellan fee schedule or the present fee schedule, that we merely have a fee set by an impartial tribunal?

Mr. VALENTI. I will be perfectly honest with you. I am not a novice to the political arena. I am convinced that it is easier to get a bill through the House if it resembles an already passed Senate bill. I am being perfectly honest with you. Anything that is radically different, will cause problems and delay.

We are willing, and have said so publicly to accept a bill in which we do not have the largest kind of faith in order to have a bill that, once and for all, blows away all the dimly lit obscuring smoke that has been hovering over this arena. However, if we started from square one, we would certainly go with your conception of this committee

deciding on copyright, as lawyers do. And then, letting the fee schedule be set by the Royalty Tribunal.

Mr. BADILLO. Thank you.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. Mr. Valenti, can you give me the rationale for the sliding scale, why it is lower at one end and higher at the other end? Why should a person pay more when he is part of a large system as one who is part of a small system?

Mr. VALENTI. I suppose, Mr. Pattison, it is on the same principle as the progressive income tax. If you make small amounts of money, your percentage is small. If you make large amounts of money, your percentage is larger. That is the only connection to reality I can see in it as some basis in the way we do things.

I do not know how it was organized, so I cannot tell you the specific origins of the fee schedule.

Mr. PATTISON. There is a provision of the bill that provides for suits by networks, infringement suits by networks even when the networks are not the owners of the copyright. Cable people have objected to this, they said their position is that any infringement suits should be brought by the copyright owner.

Would you comment on that?

Mr. VALENTI. Mr. Railsback I will be honest with you. Excuse me, Mr. Pattison. I am not sure I could answer that question.

Generally speaking, we think any infringement ought to be handled in the courts. And our position is, I think, that we would go with this bill, with the networks being able to sue for infringement. But I am not sure that it is a question on which we would do or die.

Mr. PATTISON. The cable people alleged that because of the bad feelings between cable and the networks, that there would be a lot of harassing suits that perhaps would not be brought by the copyright owners.

Mr. VALENTI. May I turn to my counsel on this? Do we have a strong position on this particular amendment?

Mr. MEYER. Well, Mr. Chairman——

Mr. KASTENMEIER. Will the witness identify himself?

Mr. MEYER. I am Gerald Meyer, one of the attorneys for the Motion Picture Association.

The present copyright law, as I understand it, and in the new bill, too, provides that an exclusive licensee may bring an action for copyright infringement.

I think the networks and broadcasters should speak for themselves. I believe they are concerned that in some instances they may not be the beneficiaries of exclusive contracts, and they would therefore have difficulties in bringing a lawsuit.

Now, from the viewpoint of the copyright owners, since we have the right to sue, we are satisfied. But, there is another reason why we support the broadcasters. This provision is contained in the Consensus Agreement. We feel honorbound on every provision of the Consensus Agreement. This is one of the concessions that the broadcasters received as part of the Consensus Agreement. And therefore we support that desire of the broadcasters for that provision as being part of the Consensus Agreement.

Mr. PATTISON. One other question. The bill exempts certain master antenna systems on apartment houses and hospitals. I am not sure on what basis it does that. But I have an idea that it might be on the basis that they provide no additional service to that signal, that is, in truth, a master antenna. And there is no amplification of head-end or anything like that.

Mr. VALENTI. That is right. I think that it is in the public interest, it seems to me, and as long as the apartment house did not charge the tenant for the service.

Mr. PATTISON. And presumably, it would be included. They may not charge for it as a separate charge, but presumably that would be one of the things.

Mr. VALENTI. Yes; but his audience is finite. There are 60 apartments and that is it.

Mr. PATTISON. There may be 10,000.

Mr. VALENTI. There may be 10,000, we stand by the bill.

Mr. PATTISON. As the distinction is really one of what you do to the signal, I think that is basic to the whole bill: The difference between a rooftop antenna where I have no amplification and a head-end where I really process that signal and pick up, perhaps, a very faint signal and process it and send it back out again.

Mr. VALENTI. Mr. Edward Allen, the cable operator I quoted, said that cable systems do things to these signals when they bring them in.

Now, the housetop antenna is not just a master antenna up on the roof. You have a television set. There is no amplification nor other distribution of the signal. Your television set simply picks up the signals received by the master antenna on top of the roof. It is literally a housetop antenna.

Mr. PATTISON. Analogies are always difficult. But, perhaps the analogy is like a concert that you put on and you sell tickets to and the sound that emanates from the stage goes out beyond the area of the concert. And if you are walking out there, you can listen to it, but, I would presume it would be a copyright violation if you were out there with some sort of an amplifying device and were then piping it somewhere else and putting on another concert.

Mr. VALENTI. For which you were charging money.

Mr. PATTISON. Whether you charge money or not.

Mr. VALENTI. I would have to say that that could be, in my judgment, a copyright infringement.

Mr. PATTISON. Whereas, obviously, sitting out there and listening to it, you would not be.

Mr. VALENTI. No.

Mr. PATTISON. Even if you owned a house out there and were charging admission to people coming into your house.

Mr. VALENTI. The people who stand outside drive-in theaters and watch movies——

Mr. KASTENMEIER. I have one last question. I realize that you have been in the witness chair a very long time. I appreciate your responses.

The bill would not, by virtue of its schedule, apply to a community antenna system which might be municipally owned and would transmit the signals to people, let us say, on the other side of the mountain of the Alleghanies outside of Pittsburgh.

If the situation in the community were that the community owned and operated a system for which there were no direct payments made,

there would be, in fact, no gross receipts connected with the operation. In such an event, there would be no royalty, it would not attach under this——

Mr. PATTISON. Will the gentleman yield?

Mr. KASTENMEIER. Yes.

Mr. PATTISON. Are you referring to the translators that are owned by local governments? I do not think there are any local governments that own systems, wires, and the rest of it. But as a matter of community service, they own a translator that picks it up and rebroadcasts it in that particular community——

Mr. VALENTI. It is on page 14 of the bill. Mr. Chairman, I think it says in there that the secondary transmission is not made by cable transmission but is made by governmental body or other nonprofit organization without any purpose of direct or indirect commercial advantage, and without charge to the recipients.

Mr. KASTENMEIER. In that situation, there is no copyright royalty attached.

Mr. VALENTI. That is right.

Mr. KASTENMEIER. I was trying to think of a situation which might not be that situation as anticipated. But another situation might not necessarily be. I was trying to think of a situation in which they were not, in fact, gross receipts, but in which you could have a cable system.

Mr. VALENTI. My imagination does not leap that far.

Mr. KASTENMEIER. In any event, thank you very much for your testimony.

[Supplemental statement of Jack Valenti follows:]

SUPPLEMENTAL STATEMENT OF JACK VALENTI, PRESIDENT OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., AND THE ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.

I am Jack Valenti, President of the Motion Picture Association of America, Inc. (MPAA). In behalf of the Association of Motion Picture and Television Producers, Inc. (AMPTP), the Committee of Copyright Owners (CCO) and the MPAA, I appreciate the opportunity to file this statement.

It supplements my more detailed testimony before this Subcommittee on June 12, 1975, and is limited to two issues that arose during hearings by the Subcommittee on H.R. 2223, the bill for general revision of the copyright law. Both issues concern the liability of cable television systems for the payment of copyright fees. First, the National Cable Television Association (NCTA) argued that the schedule of copyright fees established in the bill should not be subject to periodic adjustment by an impartial Copyright Royalty Tribunal. Provision for such a Tribunal is contained in sections 801–809 of the bill. Second, it also argued that the extension of television signals into distant markets by cable systems increases advertising revenues to stations in the originating market and therefore that payment of cable copyright fees as provided in the bill would grant copyright owners "double payment" for their works.

No basis exists for both these assertions. We urge the Subcommittee to retain the Copyright Royalty Tribunal and to make its determinations subject to judicial review rather than to congressional review. We also submit that the claim of "double payment" is false and completely at odds with the realities of the marketplace.

I. THE COPYRIGHT ROYALTY TRIBUNAL SHOULD BE RETAINED AND ITS DETERMINATIONS SHOULD BE SUBJECT TO JUDICIAL REVIEW

In 1971, NCTA, as signatory to the Consensus Agreement, agreed that cable television systems should be liable for the payment of copyright fees, and that in the absence of a negotiated fee between copyright owners and cable systems, the copyright bill would simply provide for compulsory arbitration of the fee

issue. NCTA now repudiates the Consensus Agreement and argues that the fees should not be submitted to compulsory arbitration but that Congress should set the initial rates and that future adjustments should be made only when Congress considers it appropriate.

H.R. 2223 establishes the initial schedule of cable copyright fees and provides that periodic adjustments will be made in the future by an impartial Copyright Royalty Tribunal. The legislation departs from the Consensus Agreement in that the initial fee schedule is established by Congress rather than by compulsory arbitration.

We believe, however, that by retaining the principle of compulsory arbitration for future periodic review of the rates, the scheme of the legislation constitutes a workable solution to the rate schedule controversy. We have acceded to the legislative scheme solely on this basis. Therefore, we would strongly oppose any proposal to eliminate the Copyright Royalty Tribunal from the bill since this would undermine the important and salutary principle of definite and periodic compulsory arbitration to redetermine the reasonableness of the fee schedule.

NCTA asserts that no criteria or methodology is written into the bill to guide the Tribunal in setting rates. The reason, of course, is obvious: Congress does not have the time or expertise to make determinations that involve economic and fiscal research. H.R. 2223, therefore gives the Tribunal the authority to determine the factors to be considered in adjusting rates. The bill contains guidelines for the Tribunal in establishing royalty fees. These guidelines are as precise as can be devised without usurping the function of the Tribunal. They are also analogous to the standards used in other regulatory statutes, such as the "public interest" standard for the Federal Communications Commission or the "reasonable and equitable and fair" criteria used in setting postal fees.

For years, the Congress has avoided enacting laws that would involve the legislative body in the determination of rates between private buyers and sellers in commercial transactions. In a situation where the conflicting claims of the private parties are greatly at variance, it becomes essential that an expert body that can carry out the necessary research and weigh the economic and fiscal facts, be employed to settle the controversy. The Congress has consistently laid such responsibility on governmental agencies. Obvious examples that come to mind are the rate-setting authorities of the Interstate Commerce Commission and the Civil Aeronautics Board.

Common sense and precedents lead to one conclusion: NCTA is wrong in urging elimination of the Copyright Royalty Tribunal from H.R. 2223. Indeed, the Tribunal is essential in the rate-making process.

Wholly apart from the necessity of retaining the Copyright Royalty Tribunal as an integral part of the legislative scheme, we submit that the Tribunal's rate adjustment decisions should be made subject to judicial review. The bill now provides that Congress shall review the Tribunal's rate adjustment decisions. Within ninety days of a final decision by the Tribunal, either House of Congress may adopt a resolution disapproving the Tribunal's decision. In such an event, the recommended royalty adjustment does not become effective.

In our view, this provision of the bill has the distinct disadvantage of involving Congress, and particularly this Subcommittee, in the burdensome and continual task of reviewing the reasonableness of rates determined by an independent and impartial group of arbitrators. The extraordinary amount of time and energy expended by this Subcommittee in considering H.R. 2223, and its legislative predecessors, suggests that the Subcommittee would become inexorably involved in the minutiae of rate regulation if the congressional review provision is retained.

Moreover, Congress has consistently avoided intruding itself into direct review of regulatory rate matters. To the extent review powers over rates have been granted, they have been placed in the federal courts under careful and controlled guidelines. For these reasons, we urge the Subcommittee to adopt the judicial review section here proposed. The language is taken substantially from section 3628 of title 39, United States Code, that provides for judicial review of postal rate decisions. The amendment we propose provides for direct review of Tribunal decisions to the United States Court of Appeals, based on the record before the Tribunal. The text of the amendment is attached.

II. COPYRIGHT OWNERS DO NOT RECEIVE "DOUBLE PAYMENT"

The contention of cable interests that the copyright owner is paid more for his program material by reason of increased television advertising revenue resulting from additional cable coverage is demonstrably wrong. Data hereto-

fore supplied to the Subcommittee in the nature of affidavits and letters from television stations and program suppliers establish that, except in limited and isolated cases, cable subscriber coverage is not an economic or monetary factor for the television station. More importantly, such coverage never constitutes a basis for increased compensation to the supplier of copyrighted program material.

No national advertiser using a network, or partial network, considers cable coverage; and no network mentions to such an advertiser cable coverage by those of its affiliated television stations whose signal may be picked up and retransmitted by a cable system. Regional and local advertisers are primarily concerned with the basic audience coverage of the television station from whom they buy time. Information previously furnished by television stations to the Subcommittee shows that advertisers have no interest in paying for cable subscribers outside their market since the advertiser reaps no benefit.

Studies have disclosed that the percentage of additional homes covered by a cable system that do not already receive the primary television signal is of so little consequence as not to yield additional advertising revenue to the television station whose signal is being imported.

Further, these studies establish that while the carriage of the distant station's signal is of little or no value to that station in terms of increased advertising revenues, the diminution and fragmentation of the audience in the market into which the signal is imported reduces the value of the local station in that market to the advertiser with a consequent reduction of the local station's revenues.

In any event, it is an incontrovertible fact that copyright owners have not in the past and do not now obtain additional revenues for their program material from television stations due solely to cable subscriber audiences. On the contrary, as cable expands, copyright owners are losing revenue from television station buyers of their programs. The more a cable system imports distant programs and the more the cable subscribers watch the distant programs in preference to the local television programs, the more the television-viewing audience of the local station is reduced. The result is that television stations buy less and less program material and pay less and less for the material they do buy.

Thus, the fractionalization of television audiences brought about by cable system importation of distant signals directly impinges on the ability of copyright owners to sell their product. At the same time, local television stations, suffering from reduced audiences, have little or no basis to secure added advertising revenue.

It may be useful to point out the basis on which copyright holders and television stations arrive at the amount of royalty that should be paid for the use of program material. Indeed, the negotiations between television stations and their advertisers on advertising rates, coverage, and the use of the rate card, bears no relationship to the bargaining process for programs. Program suppliers and the television stations that buy their product weigh four major factors in negotiating the sale of their product to television stations: (1) the supply of program material and the demand for programs based on the competition among the number of station buyers in a television market; (2) the national rating of the market as to size, i.e., is it first, or tenth, or one hundredth; (3) the viewer value, i.e., the attractiveness of the program; and (4) the amount to be paid for the program or group of programs based on the cost of the program to the copyright owner, including marketing costs.

These are the controlling factors that decide the price of a copyright program sold to a television station. They do not involve cable subscriber coverage, and they never have. Thus, the claim that copyright owners would receive "double payment" by the imposition of cable copyright fees is demonstrably false and unrelated to the realities of the marketplace.

PROPOSED AMENDMENTS TO H.R. 2223

On page 60, beginning with line 38, strike out through line 25 on page 61 and insert in lieu thereof the following:

"§ 806. Publication of royalty adjustment decisions

"The Tribunal, immediately upon making a final decision in any proceeding for adjustment of a statutory royalty, shall transmit such decision, together with the reasons therefor, to the Office of the Federal Register. Each such decision and its reasons shall be published immediately in the Federal Register.

"§ 807. Judicial review of royalty adjustment decisions

"(a) A final decision of the Tribunal adjusting a royalty may be appealed to any court of appeals of the United States, within fifteen days after its publication in the Federal Register, by an aggrieved party who appeared in the proceeding of the Tribunal resulting in such final decision.

"(b) The court shall review the decision, in accordance with section 706 of title 5, and chapter 158 and section 2112 of title 28, except as otherwise provided in this section, on the basis of the record before the Tribunal. The court may affirm the decision or order that the entire matter be returned for further consideration, but the court may not modify the decision. The court shall make the matter a preferred cause and shall expedite judgement in every way. The court may not suspend the effectiveness of any royalty adjustment, or otherwise prevent it from taking effect until final disposition of the suit by the court. No court shall have jurisdiction to review a final decision of the Tribunal adjusting a royalty except as provided in this section."

On page 61, strike out line 36 and insert in lieu thereof the following:

"§ 809. Judicial review of royalty distribution determinations"

On page 85, between lines 27 and 28, in the chapter analysis, strike out items 806–809 and insert in lieu thereof the following:

"806. Publication of royalty adjustment decisions.

"807. Judicial review of royalty adjustment decisions.

"808. Effective date of royalty distribution.

"809. Judicial review of royalty distribution determinations."

Mr. VALENTI. Thank you.

Mr. KASTENMEIER. I want to go off the record.

[Discussion off the record.]

Mr. KASTENMEIER. I will call the next witness.

Representing the first representative of the broadcasting industry, Mr. Robert Evans, the vice president of Columbia Broadcasting System.

We have heard from Mr. Evans before on a different question. Now, we will hear Mr. Evans on section 111.

[The prepared statement of Robert V. Evans follows:]

STATEMENT OF ROBERT V. EVANS, VICE PRESIDENT AND GENERAL COUNSEL, CBS INC.

My name is Robert Evans. I am Vice President and General Counsel of CBS. I appear today to give qualified support to the compulsory license provisions for cable television in section 111—not because we agree with everything in section 111—but because we believe it is critical that a principle be established, the principle of statutory copyright liability for cable system carriage of copyrighted programs contained in broadcast signals. Support has been given for such liability by the present Register of Copyrights and her two immediate predecessors, by the present Chairman of the Federal Communications Commission and his immediate predecessor, and by the present Acting Director of the Office of Telecommunications Policy and his immediate predecessor. But today, as you know, cable television is completely exempt.

Unless the principle of copyright liability is written into the law, the strains in the copyright structure caused by not having a major, growing industry subject to copyright may very well cause the whole system to collapse under the pressure of demands for a similar exemption from other industries. These other industries will also want a free ride. They may even need a free ride to survive the unfair competition from the cable television industry. Economically marginal broadcasters in small markets might logically be first in line for such an exemption.

The cable industry now serves approximately 10 million American homes and its growth has been phenomenal. A recent study predicts that there will be 22 million cable television subscribers by 1983. Some cable television systems originate programs of their own, and as to these originated programs there cannot be any dispute—cable television is subject to the normal operation of the copyright law. Despite this lack of dispute, I understand on excellent authority that no cable television system to this day pays performing rights royalties for the use of the music contained in its originated programs. The only explanation I can give for this fact is that the law of copyright is so distorted in the broadcast signal carriage area that the effects of the distortion

have even carried over into the origination area. This is but one of the strains caused by the anomaly of having cable television live outside of the law.

What is so peculiar about the law in the broadcast signal carriage area? First, I remind you that conventional televison is subject to the normal operation of the copyright law. Conventional television's product is a picture delivered on television screens in American homes. To make delivery of that picture, a conventional television station must go into the marketplace for every copyrighted program it includes in its broadcast signal, and negotiate with the copyright owners and pay them for licenses. The product that a cable television system sells to its subscribers is the very same signal containing the very same copyrighted programs. The subscribers may be in the normal broadcast area of the broadcast station or they may be outside of the normal broadcast area. Indeed, the subscribers may be hundreds and hundreds of miles outside of the normal broadcast area of the station. It does not matter—under the present copyright law the cable system sells to its subscribers the same picture on their television screens that conventional broadcasters must pay for, and the cable system does not have to get permission from the copyright owner or to pay him a dime. The scope of this free ride is striking. Listen to what David Foster, President of the National Cable Television Association told the Senate Subcommittee on Antitrust and Monopoly on May 21, 1975: "Today the cable television industry is almost completely reliant upon the broadcasting industry for its product. About 85 percent of what cable television provides to its viewers is what we receive from the broadcasting industries."

Forget for a moment the obvious injustice to the copyright owner. Imagine yourself a conventional television broadcaster, in competition for audience, which is your lifeblood, against a cable system in your market which carries two or three or four imported distant broadcast signals without paying anything for the programs in them; which may originate programs of its own on several channels; which may sell advertising on those channels, competing with you for the local advertiser's dollar; and which, perhaps, has a pay cable channel as well; and you will readily understand why broadcasters believe the copyright law is distorted in the cable television area. And this massive, involuntary subsidy of the free use of broadcast signals not only affects broadcasters adversely; it also affects all others who are subject to the normal operation of copyright law, such as motion picture theater owners who see this involuntary subsidy making it possible for cable to exhibit feature films on its pay channels in competition—I say unfair competition—with them.

It seems to us that cable television should be compelled to bargain in the marketplace for the programs in broadcast signals, just as broadcasting, which is completely subject to the operation of the copyright law, must bargain.

However, we have reluctantly concluded that there is just no possibility that the Congress will pass legislation subjecting cable television to the full operation of the law. Consequently, CBS supports a compromise under which the original fee schedule suggested by the McClellan Subcommittee—one percent to five percent—would be reincorporated in subsection (d)(2)(B) of section 111 and section 801(b) would remain unchanged so that the Copyright Royalty Tribunal will be available to assure the possibility that future royalty rates will be reasonable.

The Copyright Royalty Tribunal's power to adjust rates is vital not only to prevent the obvious injustice of a permanently inflexible compulsory license royalty fee, but also to get the job done. The Congress will never be finished with the cable television fee schedule if it puts itself into the position where only it can provide relief from royalty fee injustice.

TESTIMONY OF ROBERT V. EVANS, VICE PRESIDENT AND GENERAL COUNSEL, CBS INC.

Mr. EVANS. My name is Robert Evans. I am vice president and general counsel of CBS. I appear today to give qualified support to the compulsory license provisions for cable television in section 111, not because we agree with everything in section 111, but because we believe it is important and critical that a principle be established, the principle of statutory copyright liability for cable television carriage of copyrighted programs contained in broadcast signals.

Support has been given for such liability by the present Register of Copyrights and her two immediate predecessors, by the present Chairman of the Federal Communications Commission and his immediate predecessor, and by the present Acting Director of the Office of Telecommunications Policy and his immediate predecessor. But today, as you know, cable television is completely exempt.

Unless the principle of copyright liability is written into the law, the strains in the copyright structure caused by not having a major, growing industry subject to copyright may very well cause the whole system to collapse under the pressures of demands for a similar exemption from other industries.

These other industries will also want a free ride. They may even need a free ride to survive the unfair competition from the cable television industry. Economically marginal broadcasters in small markets might logically be first in line for such an exemption.

The cable industry now serves approximately 10 million American homes and its growth has been truly phenomenal. A recent study predicts that there will be 22 million cable television subscribers by 1983. Some cable television systems originate programs of their own, and as to these originated programs there cannot be any dispute—cable television is subject to the normal operation of the copyright law. Despite this lack of dispute, I understand on very good authority that no cable television system to this day pays performing rights royalties for the use of the music contained in its originated programs. The only explanation I can give for this fact is that the law of copyright is so distorted in the broadcast signal carriage area that the effects of the distortion have even spilled over into the origination area. This is but one of the strains caused by the anomaly of having cable television live outside the law.

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Listen to what David Foster, past president, I believe, of the National Cable Television Association told the Senate Subcommittee on Antitrust and Monopoly on May 21, 1975, "Today the cable television industry is almost completely reliant upon the broadcasting industry for its product. About 85 percent of what cable television pro-

vides to its viewers is what we receive from the broadcasting industries."

Forget for a moment if you can, the obvious injustice to the copyright owner. Imagine yourself a conventional television broadcaster, in competition for audience, which is your lifeblood, against a cable system in your market which carries two or three or four imported distant broadcast signals without paying anything for the programs in them; which may originate programs of its own on several channels; which may sell advertising on those channels, competing with you for the local advertiser's dollar; and which, perhaps, has a pay cable channel as well; consider these things, and you will readily understand why broadcasters believe the copyright law is distorted in the cable television area.

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Mr. DANIELSON [presiding]. Thank you very much.

The gentleman from Illinois.

Mr. RAILSBACK. No questions, and thank you for coming.

Mr. DANIELSON. You are within the 5-minute rule, Father Drinan.

Mr. DRINAN. Thank you very much, Mr. Chairman.

And Mr. Evans, you are not quite fair to the Congress, it seems to me, when you say you and your colleagues have concluded there is just no possibility that the Congress will pass legislation subjecting cable television to the full operation of the law. That is your interpretation of the law. What is the law? What would be the full operation of the law? And what are you saying we do not have the guts to do?

Mr. EVANS. I do not say you do not have the guts to do it.

Mr. DRINAN. We do not have the brains to do it.

Mr. EVANS. Looking at the long history of efforts to reform——

Mr. DRINAN. What is the full operation of the law, sir?

Mr. EVANS. The full operation of the law would be to subject cable people to normal payments that every other user of copyright——

Mr. DRINAN. What are normal payments? We have never had cable in the history of mankind before.

Mr. EVANS. Normal payments are usually the payments that you negotiate in the marketplace. Normal payments, I would agree, are not compulsory license fee payments. But it has taken us a long time to get where we are now, and it is our judgment that it is more important for the broadcasting industry to get a principle established of liability, of an obligation to pay copyright fees, and we will take what we can get as long as that principle is established, because we think once that is done, there will be an opportunity at least to collect some money. And whether it is a revision by Congress, which I think would tie the Congress up indefinitely, or whether it is a review and revision by a Copyright Royalty Tribunal, there will be an opportunity for people to bring in evidence and talk about what they think they ought to pay, from both sides.

Mr. DRINAN. Suppose the Congress came to the conclusion that cable should not be subjected to copyright, that we would say that the 1909 law did not provide for it? The Supreme Court said it is up to Congress. Suppose the Congress decided that there is no such thing as what you call the full operation of the law; copyright does not apply here. How much would CBS lose?

Mr. EVANS. What we lose is the gradual erosion of the economic well-being of our affiliates. Put it this way—suppose there is a cable system in Rockford, Ill., which is some 100 miles or so away from Chicago. There are 1,000 subscribers there, 1,000 subscribers that cannot be reached from Chicago. Suppose that a cable system in Rockford imports a movie, runs it on its system. A local advertiser in Chicago is not going to buy that coverage, because he does not want to be in Rockford. A national advertiser goes on the network; he is not going to pay any money for that, because he says, I am on the network; I am going to get into Rockford on the affiliate there; I do not need to buy that sort of coverage. A regional advertiser who sells in northern Illinois says he might—I sell some things in Rockford; I will pay something for those 1,000 people there, but I am not going to pay the full rate that the local Rockford station could get. Once that movie has gone into Rockford, that market is killed for that movie, or at least severely damaged in terms of either the motion picture company that owns the movie or the broadcaster who licenses it and tries to sell it to an advertiser. It is killed for those people, or severely damaged in the sense that they are never going to get what they ordinarily would get.

Mr. DRINAN. How many CBS-affiliated stations are there?

Mr. EVANS. About 200.

Mr. DRINAN. So you are protecting the 200 against competition, against the pluralism I spoke of before?

Mr. EVANS. I think it is unfair competition, I would say.

Mr. DRINAN. Why, because of copyright?

Mr. EVANS. Yes; that cable system is not paying anybody anything. As I see it, he is taking somebody else's product and he is selling it for a profit.

Mr. DRINAN. Suppose we conclude that the Founding Fathers, when they put copyright in the Constitution, did not mean it should extend to this type of duplication? Suppose, hypothetically, we decide that? Would you think we would get a lot of diversity or pluralism, or would you people not come to some agreement or arrangement independent of the copyright? Or would the cable people become more aggressive and establish all types of stations, with the results that I could have my dream; I could have 30 stations available on a night?

Mr. EVANS. You certainly would have a healthy cable system in your community.

Mr. DRINAN. No; not really at all.

Mr. EVANS. He would be in excellent shape if he could bring in all those signals and not have to pay and be able to sell his service for some reasonable fee. He would be in excellent shape. But I wonder if, after 10 years, if he would have 30 stations whose signals he could take. I wonder if those stations would still be around after there had been the competition that those stations will be getting in their markets.

Mr. DRINAN. You are fighting competition, and you are using copyright to do it. It comes down to that.

Mr. EVANS. I would not say we are fighting competition. I think we are fighting unfair competition, yes. I think a fellow that——

Mr. DRINAN. The full operation of the law means—to go back to your words—that the 200 CBS-affiliated stations thrive and prosper and have no new competition?

Mr. EVANS. No; we are all for competition. But we do not want the sort of competition where a competitor pays nothing for the product that he resells to subscribers. We think that is unfair competition.

Mr. DRINAN. Answer the question that Mr. Valenti did not answer, that if this fee is so minimal, if the McClellan schedule is arbitrary, and that if this really could never put the cable television people out of business—it is so small—then why is the media and CBS fighting for it so desperately?

Mr. EVANS. I am not sure we are desperate, but we are convinced it is unreasonable and unfair to let this industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime. That offends my sense of the way things ought to work in America.

Mr. DRINAN. We do not fight about a dime, and you admit it is only a dime. It is peanuts, to use the argument that is running here, that it cannot put the cable people out of business if we charge them 26 cents a month or something like that. And therefore, it is not going to help CBS that much. But I see CBS and the motion pictures, and the establishment and all these organizations fighting as if this were their very economic survival.

Mr. EVANS. It certainly is the economic survival of our network. We do not think those 200 affiliates can survive with the kind of competition they are going to get if there is no copyright liability. You speak of a relatively few cents—these fellows would pay on a schedule of say, a half to 2½ percent, as it now exists. There was some talk earlier, from Mr. Danielson, about what broadcasters pay in real, honest-to-goodness copyright fees for all the programs they get. I do not have those figures, but I can give you one hard figure. For just the music, we perform on our network, just the music alone, we pay a little better

than 3 percent of our gross receipts. That is just to play the music; that is without paying a penny to any of the program suppliers who sell those programs.

That is why we feel that when the top fee for the cable fellows is 2½ percent, something is wrong.

Mr. DRINAN. Three percent of the gross for music—that is not precisely for copyright; that is for the production of music.

Mr. EVANS. No, sir; that is for the performance of the music. That goes to ASCAP and BMI and SESAC. That is just to perform the music. We pay another fee, as you say, for putting the music into the sound track; we pay that. In addition, of course, we pay the ordinary series royalty. There is an underlying property; the author of that gets a royalty because of his copyright; and there are writers; they get a royalty because of their copyrights. Then there is the music fee. So there is a good bit of just pure copyright money spent by broadcasters. And I started at a base of 3 percent; I know it has got to be a lot more than that, when you figure that we, at the networks, spend 50 percent of our gross receipts for programs, to buy programs. That is an awful lot of money.

Mr. DRINAN. Mr. Evans, thank you very much.

Mr. DANIELSON. Thank you. Your 5 minutes have expired.

Mr. Pattison.

Mr. PATTISON. I have one question, I guess, that relates to this problem of diversity and what is available. Cables frequently talk about 20, 30, 40, 60, 80 channels, but in fact, what do they have to put on their channels? What actually can they do? What is the limit? I do not mean the mechanical limit, but what do they actually show on these channels?

Mr. EVANS. Well, they get signals from three networks, and they show as many independent stations as they can reach.

Mr. PATTISON. How many independents are there, I mean that actually produce programs?

Mr. EVANS. I think all of the independents are totally responsible for their own programing. They are not producing it themselves, perhaps, but they are buying it from motion picture companies and other producers. I think it is just a question of the physical limitation on how far you can haul a signal, as to how many more channels you can add on. I have been in motels where there were seven or eight television stations available, three networks, plus four, five, six independent stations.

Mr. PATTISON. When you talk about this diversity, what is available to put on these channels? Suppose you could put up a cable system anywhere you want, put anything you wanted on it, you could take it off the air, buy it, anything else. What have you got to put on that?

Mr. EVANS. You have what the producers in New York and Hollywood are making, I suppose. That is about it, plus sports, plus an occasional symphony for Mr. Drinan, things of that nature. But I see your point. What you are saying is, how much is there out there that we are not getting now?

Mr. PATTISON. Is it not true when cable first started there was not any nonduplication rule, so you could throw out the show "I Love Lucy" on three channels that you pulled in from a variety of places, but that does not give the listener any diversity, does it?

Mr. EVANS. No, sir. The diversity would have to come from the cable systems themselves originating material on their free channels.

Mr. PATTISON. On which there is no copyright problem.

Mr. EVANS. There is where you have to look for much greater diversity than expected in the past. I have read their prospectuses. They have made many great promises about what they would do. They said they would uplift the general level of television fare that was available. I suppose New York is a good example. It seems to have the biggest systems with the most money. My observation is they have not done very much.

Mr. PATTISON. One final question—is it not true that the basic stock of things that are available to show on either television or cable has been diminishing? In other words, we have been using it up—the old movies—how much more of that is there? Are we using it up faster than we are producing it?

Mr. EVANS. I do not think so. Those things go in cycles. At times there are many more movie nights, as we call them, on the TV networks, and then there are seasons when they are cut back. Instead of having them 3 nights, they have 2; instead of 2 nights, they have 1. I do not think—I have never heard our program people say they were running out, for example, of a supply of movies. I do not think that is the case.

Mr. PATTISON. Thank you.

Mr. DANIELSON. Mr. Railsback.

Mr. RAILSBACK. One brief comment which I cannot resist making. It seems to me that we, perhaps, have not alluded enough to the risk factor that a network or a station takes in purchasing the right to show a film. Some of these, I would guess, are not successful. The loss would be incurred on some, and the cable user would not bear any risk at all.

Mr. EVANS. That is particularly true, of course, with a series. The motion picture usually has played in theaters before it goes to television, so that the film buyer has some opportunity to see whether it was a popular picture, a flop, or what have you. But picking television series, as anyone knows who looks at the network schedules in the fall and then the network schedules in the spring, is not a science; it is hardly even an art. I do not know what it is—a guessing game, perhaps.

Mr. RAILSBACK. So, it is not just the expenditure of the money, as far as production, but it is also a risk factor that could result in a loss to whoever had to buy the product?

Mr. EVANS. A total loss, if the series is unsuccessful, and we have had them. We take them out after four or five broadcasts, swallow a good many million dollars, and hope we will do better next time.

Mr. RAILSBACK. Thank you.

Mr. DANIELSON. You are able to hedge a little bit on that, though, as I recall, by, instead of buying your series for whatever it is—36 weeks—you can pick it up in segments of what—9 weeks or something like that?

Mr. EVANS. Yes. The business people try to get a short option to begin with, but they are not always successful. The star is going to say, you put me on for the season and that is it, or you pay me.

Mr. DANIELSON. On the series, as opposed to the star, though, I think you buy it in series itself. Now, we do not have—I do not think there is any quarrel here with anybody, witnesses or committee members, on

the fact that cables should pay a regular license fee for copyrightable material on programs they originate themselves. I have not heard anybody contend to the contrary from any segment of the discussion.

We have got a little different situation when you are in a prime viewing area where, as Mr. Drinan pointed out, really all the cable man is doing is picking something off of the air with a better antenna than you have on your own rooftop and distributing it into the houses. It is sort of in the category of a slave antenna, you might say. It is no new origination. It is just making it possible to receive the signal that you would get yourself if you had a good antenna. Obviously, we have got real problems when you get into overlap or long-line distance programs. I am just giving you that as a recap. That is the way it looks to me on June 12.

You mentioned the music—paying 3 percent of your gross. I suppose—do you not include that factor as one of the cost factors when you sell your advertising?

Mr. Evans. I am sure we do, absolutely.

Mr. Danielson. Which gets us right back to where we have been hung up for a long time. What is really included in your advertising rates? What does the advertiser buy? Is he buying just the primary viewing area or is he buying the entire area served, either directly or through cable? I hope that through Mr. Valenti's help we are going to be able to come to some rational disposition of that. But you gave us a little help, in your colloquy with somebody. You talked about a town in Illinois called Rockford that a regional advertiser from a Chicago station might, in his negotiations say, well, I will pay you something for those 1,000 viewers over in Rockford, not a heck of a lot. You will pay a little bit for that 1,000. Implicit in that statement is the fact that, in buying that time, he did consider that 1,000 people. Implicit in that statement is the fact that you must have charged him something for that 1,000 people.

Mr. Evans. I am not denying that possibility.

Mr. Danielson. So you have got some copyright license fee involved there. How much, I am not able to tell you, but it feels to me like there is something in there.

Mr. Evans. There may be something at the local station level. I can tell you from the network viewpoint—I have talked to our sales and business people in the recent past and asked them this. When a national advertiser comes to you and wants to buy the Walter Cronkite news, do you factor in coverage that you get because of cable television? They said, Absolutely not. When you are dealing with the network, there is no extra charge because of cable. Now, I suspect that is because they feel that the extra network coverage, when you think of the whole country, is not that significant. It is not worth saying, well, we want another $2,000 or $10,000 for that.

Mr. Danielson. I do not want to labor the point, but I fully respect what you have told us here. It is just that I think it is something we ought to learn a little bit about. We may find that it comes to nothing, that it is not significant. However, along with that, one of the corollaries is this: Mr. Valenti said awhile ago that when a program is sold to film—I am sure he will be talking about it—to be broadcast from Baltimore and they pick it up in Richmond, he said, well, the advertiser is not interested in just the cable market in Richmond. If

he is going to buy the market in Richmond, he wants the whole Richmond market, not just the cable market. That permits more than one inference. Maybe he feels the cable market in Richmond is not significant, and so, therefore, it is something you should not worry about.

A reciprocal is, nearly everybody watches television through the traditional channels and very few through cable. In that event, is cable really hurting the traditional very much? You cannot have it both ways. Either the cable is significant or it is not significant. If it is not significant, maybe we are not talking about anything here; on the other hand, if it is significant, then maybe it is cranked into these advertising factors. These really are not questions; I am just letting you know what some of the problems are bubbling around in my mind. And I do hope that somebody will help me resolve them before too long.

You can comment if you like, but I do not know how to ask the question.

Mr. EVANS. That was the point I was trying to make in making up a hypothetical about Rockford, suggesting that to the extent there were families there that you could reach through cable, to the extent that was recognized and to the extent somebody was willing to pay for that, then to have a movie go in there from Chicago—to that extent you have severely damaged the chance of a local Rockford station to sell, at its full rate, that movie when it became available to him. That was the only point I was trying to make.

Mr. DANIELSON. You said you have severely damaged it. If there are 1,000—and the figures you use, I know you are pulling them out of the air here—if there are 1,000 cable outlets in Rockford, I do not know what the potential market there is. Does that cover the whole city, 1,000?

Mr. RAILSBACK. It is a big, metropolitan area. One thousand was just a hypothetical——

Mr. DANIELSON. I do not know if 1,000 is significant. Maybe you cannot severely damage it with 1,000. Could I be severely damaged with a sliver here?

Mr. EVANS. I understand your point. If there are a million viewers there and you have added 1,000, it does not matter very much. If there are 5,000 viewers and you have added 1,000, in my hypothetical you have done something significant.

Mr. DANIELSON. I will stipulate I do not know any of these answers, but I think they are problems we are going to have to explore further.

Does any of you other gentlemen have another——

Mr. DRINAN. Just one last question—maybe CBS should buy up the cable companies and radiate your product out more and more. I am surprised that the big networks have not cut cable, and radiate your fine product from Chicago to Rockford.

Mr. EVANS. At one time, Mr. Drinan, CBS was perhaps the major cable operator in the United States. But the FCC wisely decided that no one should be in the network business and the cable business at the same time, and we immediately disposed of our cable interests.

Mr. DRINAN. Maybe that was a mistake—I mean the FCC ruling. If we go back and relitigate that and you people win, the problem is over.

Mr. DANIELSON. I want to thank you, Mr. Evans, and in fact, thanks to all of the witnesses for your forbearance and patience and for giving us all of this valuable information.

We are going to recess at this time until 2 p.m., at which time the first witness will be Mr. John Summers, general counsel of the NAB—I guess that means National Association of Broadcasters. And then we will have Mr. Bowie Kuhn, Commissioner of Baseball; Donald Ruck, Vice President of the National Hockey League; and Captain John Coppedge, Chairman of the Subcommittee on Cable Television of the NCAA Television Committee.

And without further, we recess.

[Whereupon, at 12:50 p.m., the subcommittee recessed to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION

Mr. KASTENMEIER. The committee will come to order.

When we recessed we concluded hearings from Mr. Robert Evans, Vice President and general counsel of Columbia Broadcasting.

This afternoon, to start out, we will hear from the general counsel of the National Association of Broadcasters, Mr. John Summers.

Mr. Summers, would you come forward?

You may proceed as you wish.

[The prepared statement of John Summers follows:]

STATEMENT BY JOHN B. SUMMERS, GENERAL COUNSEL, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. Chairman, my name is John Summers. I am General Counsel of the National Association of Broadcasters, which is located at 1771 N Street, N.W., Washington, D.C. The NAB is a non-profit trade association, which has a membership of 4,093 AM and FM radio stations, 539 television stations and all national radio and television networks.

Mr. Chairman, we appear here this morning in favor of reasonable copyright legislation covering all secondary transmissions of cable television systems. As broadcasters, we stand in two sets of shoes this morning—we are copyright owners and we are users of copyrighted material—but our position on the basic tenets of this legislation is the same in regard to both those roles.

In the limited time available to me this morning, I'd like to address myself to two areas of the proposed bill and to a small piece of historical analysis which we believe should be accorded substantial weight by this committee. First, the history.

In 1971, in response to longstanding urgings of the Congress, copyright owners, cable operators and broadcasters compromised their differences on the question of a regulatory and copyright framework for cable television. This so-called Consensus Agreement, the negotiation of which was conducted under the joint aegis of the FCC and the OTP, was accepted by representatives of the three interested parties in November, 1971.

In essence, the Consensus Agreement called first for new FCC rules favorable to CATV—these rules were adopted by the FCC in February 1972—and second for copyright legislation which would:

(1) provide for compulsory arbitration of the fee question in the event the copyright owners and cable owners could not agree on a schedule of fees in time for inclusion in the new copyright statute.

(2) give the cable owners preferential compulsory licensing treatment but limit the scope of that license to the television signals authorized under the FCC rules adopted in February 1972.

(3) exempt from copyright liability all independently owned CATV systems with fewer than 3,500 subscribers.

(4) give to broadcasters, as well as copyright owners, the right to enforce exclusivity rules through court actions for injunctions and relief.

It is extremely important to recognize that the cable rules adopted pursuant to the Consensus Agreement presupposed the enactment of copyright legislation

along the lines of the Consensus copyright provisions I have just outlined. Thus, at the present time, the equities are imbalanced in favor of CATV. Only by the enactment of reasonable copyright legislation will those equities achieve the balance envisioned by the FCC when it adopted the terms of the Consensus. Indeed, the FCC made clear it would have to reconsider those aspects of the rules favorable to CATV if copyright legislation did not materialize: "The rule will, of course, be put into effect promptly. Without Congressional validation, however, we would have to re-examine some aspects of the program. 36 FCC 2d 27."

Mr. Chairman, there has been no such reexamination of that program. But there has been a great deal of controversy, name calling, reinterpretation, and plain misstatement about the Consensus Agreement. And one thing about our acceptance is clear—the broadcasting industry reluctantly agreed to the Consensus Agreement. In response to the charge that the agreement was fostered by broadcasters, then FCC Chairman Dean Burch said, "If I were to assess the varying degrees with which the principals have decided to accept the agreement—and all of them have reservations—I would put the copyright owners first, cable second, and broadcasters a very distant third."

Mr. Chairman, however reluctant the NAB's acceptance of this agreement, however intense the opposition of our industry, one thing about our industry's response to life under that consensus is equally clear—we have rigidly and steadfastly adhered to its provisions.

We agreed to the broadening of allowable distant signal importation.

We supported the preferential treatment for CATV inherent in the notion of a compulsory license.

We have uniformly supported efforts to pass a reasonable copyright bill.

Today, some four years after the adoption of the Consensus Agreement, the bill H.R. 2223 is before you and we seek only that the spirit of the Consensus be recognized by the parties and the Congress.

The cable television industry agreed that it ought to pay some royalty for its use, for profit, of copyrighted material. If any element of the Consensus can be termed basic, it is the acceptance, by the parties, of the principle that copyright royalties are legitimately owed to the proprietors of copyrighted material. Creative endeavors, whether the product of motion picture producers or of local and national broadcasters, should not go unrewarded due to the failure to provide for their protection in a copyright law fashioned before the advent of broadcasting and cable television. The delay in the modernization of the copyright law has engendered the legitimization of conversion in the field of telecommunication. As the court of last resort, this Congress ought to render that ill-advised legitimization a nullity. As Justice Potter Stewart, speaking for the Supreme Court, said in *CBS* v. *Teleprompter*: "These shifts in current business and commercial relationships * * * simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field must be left to Congress." (415 U.S. at 414).

Beyond the principle of copyright liability lies the manner in which the amount of liability is to be determined.

A law that confers a compulsory copyright license on cable television inherently gives CATV an unfair competitive advantage over free broadcasters, who must bargain for copyrighted material they use. It is clear that CATV would pay much less for the same material, not only under the low CATV fee levels proposed in H.R. 2223 but even under the levels supported by the copyright owners. For example. FCC figures show that the typical television station pays 33 percent of its total revenue for its non-network program material.

Despite this inherent unfairness, NAB has been willing to support *limited* compulsory licenses in accordance with the terms of the November 1971 Consensus Agreement. We believe that, as provided in that Consensus, the fee levels for such compulsory licenses should be determined by an independent arbitration tribunal, and not by statutory fiat. Such a tribunal would have both the time and the expertise to sort out the conflicting claims of the interested parties and the complex and elaborate economic data advanced in support of those claims. Traditionally, Congress delegates such complex questions to a body equipped to examine them in detail. If the claims of the CATV industry to a very minimal fee are valid, that industry should not be afraid to submit them to an arbitration tribunal. Moreover, NCTA specifically agreed that failing agreement between the parties, the fees would be fixed by arbitration as part of the Consensus Agreement. As a result of that Consensus, the cable industry has been enjoying the

benefit of permissive new FCC rules on the importation of distant broadcast stations for over three years. It ill behooves the cable industry to continue its retreat from the Consensus.

While the amount of initial liability is of obvious import to the proprietors of copyrighted material, the existence of a tribunal to readjust those fees is of equal concern. The experience of attempting to find justice, in copyright, within the rigid four corners of a 65 year old statute provides compelling evidence for the wisdom of a copyright royalty tribunal. Changing technology, both in terms of its sophistication and breadth, makes readily apparent the need for future consideration of rates established in the present. Though a legislative revisiting of the modernized copyright law may be mandated by the rapidity of technological change, there is no reason to accelerate that revisiting by deleting from H.R. 2223 procedures for the fair adjustment of rates.

There are two specific points we would like to make in reference to this legislation. Our first concern is the scope of the compulsory license which would be established by this bill. The NAB reluctantly accepted the Consensus and agreed to support a limited compulsory license for CATV only because of our belief that the Consensus limitation on the scope of the compulsory license would be implemented. Provided that those limitations are implemented, we continue to support the Consensus. We submit that compulsory licenses for CATV systems should cover only CATV retransmission of local broadcast stations and such programs from distant stations as are contemplated under the FCC's 1972 CATV rules. An open-ended compulsory license—one for example that covered all CATV retransmission of distant stations which the FCC may hereafter authorize—would be a sweeping delegation to four or fewer members of the FCC to change and even radically revise the copyright law at any time in the future.

This is a delegation the Commission itself sought to avoid. Speaking in its 1972 Cable Television Report and Order, the Commission emphasized the notion that the limitation on signals under the compulsory license was an integral part of the Consensus which had to be included in copyright legislation. "The legislation that we believe must follow will limit the number of distant signals to which compulsory copyright licenses apply to those specified in Sections 76.59, 76.61, and 76.63 of the Rules."

Moreover, we reject any suggestion that local signals should be exempted from copyright payment. A compulsory license is an extraordinary remedy which relieves its recipient of the many burdens of normal copyright negotiations. Were cable operators willing to negotiate, as broadcasters do, for the rights to import individual distant signals, there would, perhaps, be some logic in the arguments regarding local signals. But there is no such willingness, in large part because the compulsory license itself provides sufficient incentives to make it desirable. Beyond the difficulties of application and definition inherent in a local signal exemption, further reductions in the scope of liability would not be consonant with the underlying notion of the compulsory license and ought to be rejected.

The second area of particular interest to the broadcasting community is retention of that section of H.R. 2223 which provides the broadcaster a copyright infringement remedy for the impermissible use of broadcast signals. Broadcasters are fully willing to support any language which will protect cable operators from harassment under this provision. But the NAB feels strongly that willful violations of the signal allotments and rules for which the compulsory license is given ought to be the subject of copyright infringement actions. Experience with the FCC has demonstrated that, even in the case of repeated violations, the Administrative process is incapable of providing efficient and effective relief from the unauthorized use of signals.

Mr. Chairman, the need for a revision of the copyright law is virtually defined by the issue of cable television. It is a technology which springs into being on the uncompensated use of another's creative product. To the author, who is the subject of the Constitution's concern, the copyright law becomes his only hope for the protection of the integrity of his work.

This is a copyright law which, in all likelihood, will stand for many years to come. It must be flexible, for the future holds in store even newer technologies. But it must also look to the past—to the Constitution—to insure that those who profit without paying compensation, of any sort, do so in violation of the intent of the Constitution's framers. To the extent that the copyright law nourishes that evasion, it violates the spirit of the Constitution. It is a violation of that spirit which must be corrected.

TESTIMONY OF JOHN B. SUMMERS, GENERAL COUNSEL, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. SUMMERS. Thank you, Mr. Chairman.

Mr. Chairman, my name is John Summers. I am General Counsel of the National Association of Broadcasters, which is located at 1771 N Street NW., Washington, D.C. The NAB is a non-profit trade association, which has a membership of 4,093 AM and FM radio stations, 539 television stations and all national radio and television networks.

Mr. Chairman, we appear here this afternoon in favor of reasonable copyright legislation covering all secondary transmissions of cable television systems. As broadcasters, we stand in two sets of shoes this afternoon—we are copyright owners and we are users of copyrighted material—but our position on the basic tenets of this legislation is the same in regard to both those roles.

In the limited time available to me this afternoon, I'd like to address myself to two areas of the proposed bill and to a small piece of historical analysis which we believe should be accorded substantial weight by this committee. First, the history.

In 1971, in response to longstanding urgings of the Congress, copyright owners, cable operators and broadcasters compromised their differences on the question of a regulatory and copyright framework for cable television. This so-called Consensus Agreement, the negotiation of which was conducted under the joint aegis of the FCC and the OTP, was accepted by representatives of the three interested parties in November, 1971.

In essence, the Consensus Agreement called first for new FCC rules favorable to CATV—these rules were adopted by the FCC in February 1972—and called secondly for copyright legislation which would provide for compulsory arbitration of the fee question in the event the copyright owners and cable owners could not agree on a schedule of fees in time for inclusion in the new copyright statute; give the cable owners preferential compulsory licensing treatment but limit the scope of that license to the television signals authorized under the FCC rules adopted in February 1972; exempt from copyright liability all independently owned CATV systems with fewer than 3,500 subscribers; and give to broadcasters, as well as copyright owners, the right to enforce exclusivity rules through court actions for injunction and reliefs.

It is extremely important to recognize that the cable rules adopted pursuant to the Consensus Agreement presupposed the enactment of copyright legislation along the lines of the Consensus copyright provisions I have just outlined. Thus, at the present time, the equities are imbalanced in favor of CATV. Only by the enactment of reasonable copyright legislation will those equities achieve the balance envisioned by the FCC when it adopted the terms of the consensus. Indeed, the FCC made clear it would have to reconsider those aspects of the rules favorable to CATV if copyright legislation did not materialize; and I quote from it's Cable Television Report of 1972:

> The rule will, of course, be put into effect promptly. Without Congressional validation, however, we would have to re-examine some aspects of the program.

Mr. Chairman, there has been no such reexamination of that program. But there has been a great deal of controversy, name calling, reinterpretation, and plain misstatement about the Consensus Agreement. And one thing about our acceptance is clear—the broadcasting industry reluctantly agreed to the Consensus Agreement. In response to the charge that the agreement was fostered by broadcasters, then FCC Chairman Dean Burch said, again in his concurring opinion in the Cable Television Report, and I quote:

If I were to assess the varying degrees with which the principals have decided to accept the agreement—and all of them have reservations—I would put the copyright owners first, cable second, and broadcasters a very distant third.

Mr. Chairman, however reluctant the NAB's acceptance of this agreement, however intense the opposition of our industry, one thing about our industry's response to life under that consensus is equally clear—we have rigidly and steadfastly adhered to its provisions. We agreed to the broadcasting of allowable distant signal importation. We supported the preferential treatment for CATV inherent in the notion of a compulsory license. We have uniformly supported efforts to pass a reasonable copyright bill.

Today, some 4 years after the adoption of the Consensus Agreement, the bill H.R. 2223 is before you and we seek only that the spirit of the Consensus be recognized by the parties and the Congress.

The cable television industry agreed that it ought to pay some royalty for its use, for profit, of copyrighted material. If any element of the Consensus can be termed basic, it is the acceptance, by the parties, of the principle that copyright royalties are legitimately owed to the proprietors of copyrighted material. Creative endeavors, whether the product of motion picture producers or of local and national broadcasters, should not go unrewarded due to the failure to provide for their protection in a copyright law fashioned before the advent of broadcasting and cable television.

The delay in the modernization of the copyright law has engendered the legitimization of conversion in the field of telecommunication. As the court of last resort, this Congress ought to render that ill-advised legitimization a nullity. The Supreme Court in the *Teleprompter* case indicated Congress had every right to pass legislation applicable to CATV and I will not repeat the applicable quote in my statement because Mr. Valenti covered it this morning.

Beyond the principle of copyright liability lies the manner in which the amount of liability is to be determined. A law that confers a compulsory copyright license on cable television inherently gives CATV an unfair competitive advantage over free broadcasters, who must bargain for copyrighted material they use. It is clear that CATV would pay much less for the same material, not only under the low CATV fee levels proposed in H.R. 2223 but even under the levels supported by the copyright owners. For example, FCC figures show that the typical television station pays 33 percent of its total revenue for its non-network program material.

I would point out there is a disparity between that figure and the 25 percent figure Mr. Valenti recited this morning. That is because we have taken the total program costs from the FCC figures without eliminating talent costs and other associated costs.

Despite this inherent unfairness, NAB has been willing to support limited compulsory licenses in accordance with the terms of the

November 1971 Consensus Agreement. We believe that, as provided in that Consensus, the fee levels for such compulsory licenses should be determined by an independent arbitration tribunal, and not by statutory fiat. Such a tribunal would have both the time and the expertise to sort out the conflicting claims of the interested parties and the complex and elaborate economic data advanced in support of those claims. Traditionally, Congress delegates such complex questions to a body equipped to examine them in detail. If the claims of the CATV industry to a very minimal fee are valid, that industry should not be afraid to submit them to an arbitration tribunal. Moreover, NCTA specifically agreed that failing agreement between the parties, the fees would be fixed by arbitration as part of the Consensus Agreement. As a result of that Consensus, the cable industry has been enjoying the benefit of permissive new FCC rules on the importation of distant broadcast stations for over 3 years. It ill behooves the cable industry to continue its retreat from the Consensus.

While the amount of initial liability is of obvious import to the proprietors of copyrighted material, the existence of a tribunal to readjust those fees is of equal concern. The experience of attempting to find justice, in copyright, within the rigid four corners of a 65-year-old statute provides compelling evidence for a wisdom of a Copyright Royalty Tribunal.

Changing technology, both in terms of its sophistication and breadth, makes readily apparent the need for future consideration of rates established in the present. Though a legislative revisiting of the modernized copyright law may be mandated by the rapidity of technological change, there is no reason to accelerate that revisiting by deleting from H.R. 2223 procedures for the fair adjustment of rates.

There are two specific points we would like to make in reference to this legislation. Our first concern is the scope of the compulsory license which would be established by this bill. The NAB reluctantly accepted the Consensus and agreed to support a limited compulsory license for CATV only because of our belief that the Consensus limitation on the scope of the compulsory license would be implemented. Provided that those limitations are implemented, we continue to support the Consensus.

We submit that compulsory licenses for CATV systems should cover only CATV retransmission of local broadcast stations and such programs from distant stations as are contemplated under the FCC's 1972 CATV rules. An open-ended compulsory license—one, for example, that covered all CATV retransmission of distant stations which the FCC may hereafter authorize—would be a sweeping delegation to four or fewer members of the FCC to change and even radically revise the copyright law at any time in the future.

This is a delegation the Commission itself sought to avoid. Speaking in its 1972 Cable Television Report and Order, the Commission emphasized the notion that the limitation on signals under the compulsory license was an integral part of the Consensus which had to be included in copyright legislation, and I quote from their report, "The legislation that we believe must follow will limit the number of distant signals to which compulsory copyright licenses apply to those specified in Sections 76.59, 76.61, and 76.63 of the Rules." Those are the sections which outline which signals cable television stations may retransmit.

Moreover, we reject any suggestion that local signals should be exempted from copyright payment. A compulsory license is an extraordinary remedy which relieves its recipient of the many burdens of normal copyright negotiations. Were cable operators willing to negotiate, as broadcasters do, for the rights to import individual distant signals, there would, perhaps, be some logic in the arguments regarding local signals. But there is no such willingness, in large part because the compulsory license itself provides sufficient incentives to make it desirable. Beyond the difficulties of application and definition inherent in a local signal exemption, further reductions in the scope of liability would not be consonant with the underlying notion of the compulsory license and ought to be rejected.

The second area of particular concern to the broadcasting community is retention of that section of H.R. 2223 which provides the broadcaster a copyright infringement remedy for the impermissible use of broadcast signals. Broadcasters are fully willing to support any language which will protect cable operators from harassment under this provision.

But the NAB feels strongly that willful violations of the signal allotments and rules for which the compulsory license is given ought to be the subject of copyright infringement actions. Experience with the FCC has demonstrated that, even in the case of repeated violations, the administrative process is incapable of providing efficient and effective relief from the unauthorized use of signals.

Mr. Chairman, the need for a revision of the copyright law is virtually defined by the issue of cable television. It is a technology which springs into being on the uncompensated use of another's creative product. To the author, who is the subject of the Constitution's concern, the copyright law becomes his only hope for the protection of the integrity of his work.

This is a copyright law which, in all likelihood, will stand for many years to come. It must be flexible, for the future holds in store even newer technologies. But it must also look to the past—to the Constitution—to insure that those who profit without paying compensation, of any sort, do so in violation of the intent of the Constitution's framers. To the extent that the copyright law nourishes that evasion, it violates the spirit of the Constitution. It is a violation of that spirit which must be corrected.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Summers.

As General Counsel of the National Association of Broadcasters, were you personally involved in negotiations leading to the Consensus Agreement?

Mr. SUMMERS. No, sir, I was not.

I was a member of the General Counsel's staff, at that time, Chief Counsel. I did not participate in those negotiations although I have spoken with parties who did, on behalf of the broadcasting industry, and I have some knowledge of what transpired.

Mr. KASTENMEIER. Does your personal knowledge of what transpired, does that limitation accord with preceding testimony given to this committee, yesterday and today, on the subject?

Mr. SUMMERS. No, I do not think, fully.

Mr. KASTENMEIER. In what connection does it not?

Mr. SUMMERS. My understanding is that all of the parties—the three groups represented—were called in together to the White House.

Shortly after the FCC August 5, 1971 letter of intent, and following a subsequent letter from Senator Pastore to OTP asking for their comments on the Commision's letter, the three industry parties were called in to OTP and told that it would be good for the public interest and for all of the industries involved, if they could get together and compromise their differences, because it appeared that everyone was headed for a lot of court litigation, possible legislative hearings, and there was a great—I understand it is reflected in the Commission's Cable Television Report—a great desire on the part of the FCC and OTP to get cable moving to thaw out this freeze.

And the only way they felt they could really do that was to get the parties to compromise their differences. After that initial meeting, it is my understanding there were approximately three meetings with OTP, but for the most part they were separate meetings.

In other words, OTP met separately with the copyright owners and with the cable owners and broadcasters. The broadcast representative I spoke with said there were two meetings at OTP involving just the broadcasters and OTP and one where the broadcasters met jointly with the copyright owners and OTP.

During these meetings, the industry parties provided input in terms of what they would like to get in a regulatory package, and what they might be willing to compromise.

There was also one meeting at the FCC after this series of approximately four meetings. There were no drafts, from what I have been told. They were not even shown any drafts. There were just discussions. After these four meetings, they were called in to OTP. They were given, for the first time, a written piece of paper—it was the Consensus Agreement—and told that they could either accept or reject it, in approximately a week.

There was no chance to revise it.

Mr. KASTENMEIER. Were all the parties in the same boat?

Just as a matter of fact, did the various groups subscribe to it? Did a majority of the various groups involved subscribe although in some cases there were participants, individually, or particular associations within groups, that did not subscribe?

Mr. SUMMERS. Yes. I did attend the NAB board meeting at which this matter was discussed and finally adopted, but I can tell you from personal experience that was a very, very bitter meeting.

Many people were bitterly opposed. In fact, everybody was bitterly opposed, but cooler heads prevailed in the spirit of compromise. I think the final vote—I am referring back to a piece from Broadcasting magazine, published a few days after the adoption—the vote was something like 27 to 3 on the NAB Board.

I would correct—possibly offer as an informational item—what the gentleman, I believe, from Teleprompter said yesterday; I think he said that the NCTA vote was very close—only by two votes. Broadcasting magazine reported within a week after the adoption that their vote was 14 to 5.

Mr. KASTENMEIER. I could probably, to the extent that it is important, we could probably verify that.

I, perhaps, should have asked Mr. Evans. Is it my recollection that CBS was one of the parties that initially did not agree? One of your constituent members?

Mr. SUMMERS. Yes; two members of CBS were at that time members of the board, and they abstained from voting on this matter.

Mr. KASTENMEIER. It has been represented that the bill more or less conforms to the Consensus Agreement. But from your testimony, and from other testimony, the Consensus Agreement provided that CATV systems with fewer than 3,500 subscribers would be exempt.

But that, of course, is not in this bill. How did that come about?

Mr. SUMMERS. I just assume that one of the inputs at OTP by the cable people was they wanted some kind of exemption for their smaller systems. I assume that OTP felt that 3,500 was a reasonable figure, and it was included in the Consensus. And, of course, as I said, the parties did not have a chance to revise or qualify their acceptance, and so it is part of the Consensus and we do support that. We did support it in the hearings before Senator McClellan, but I must say that we support that 3,500 exemption as a package, as part of the total Consensus. We do not support it broken out as a separate provision.

Mr. KASTENMEIER. In other words, you are saying it was legislatively renegotiated, and that dropped out, as well as certain other things, that your side of the table had wanted?

Mr. SUMMERS. That is right. And something that I think Mr. Valenti overlooked this morning when you asked him what provisions of the Consensus are not included in the legislation, a very important one to broadcasters is what we call the trigger provision, which is an agreement by all parties that the copyright legislation would provide a compulsory license which would cover only those signals authorized by the FCC in their 1972 package of cable rules.

Any additional signals they might authorize at a later date would be subject to full copyright liability.

Mr. KASTENMEIER. On page 3 you indicate, "At the present time the inequities are imbalanced in favor of CATV" referring, presumably, to the rules. And you go on to say, further, that "Indeed, the FCC made it clear that it would have to reconsider these aspects of the rules favorable to CATV if copyright legislation did not materialize."

Is it your understanding, or your observation, the Federal Communications Commission is still in the same stance? That is to say, it might be disposed to reconsider both those aspects?

Mr. SUMMERS. I would certainly hope so. We have a petition before the FCC right now, a petition for rule making, in which we have reminded them—and this was not only one pronouncement, they made this pronouncement on three or four different occasions—reminding them that this was a balancing of the equities.

The need for copyright legislation, along the lines of the Consensus Agreement, was part of the overall package and they had promised, if copyright legislation of this nature did not materialize, they would have to go back to the so-called "distant signal" rules and the other aspects of the rules that were favorable to cable, and reconsider them.

Mr. KASTENMEIER. One other point, and that is, in the bill and in the Consensus Agreement, a provision that broadcasters would have recourse to infringement suits along with the originating companies, who license the broadcasters.

What is your analysis of the law—or of your licensing agreements which would necessitate that particular provision in this bill?

Mr. SUMMERS. I personally cannot say I am familiar with the agreement or what they provide between the stations, so to speak, and the copyright proprietor, but I do know there is a great need in our industry for some quick way to remedy violations of the cable rules by cable television systems.

There is a provision in the Communications act for a cease and desist procedure, and show cause orders, but that is a very cumbersome procedure and usually a station that petitions the Commission to issue such proceedings is going to have to wait a year or more before anything happens.

So, I feel it is very important that the stations have a right, in purchasing programing, to remedy infringements of those rights directly with the courts.

Mr. KASTENMEIER. I would like to yield to the gentleman from New York, Mr. Pattison.

Mr. PATTISON. Just one question. On the distant signal importations, the FCC rules now provide for what in terms of importation of distant signals? I know, generally, what they provide, but is there a number?

Mr. SUMMERS. Yes. Let us talk, first, about the cable system that is located outside any television market. That is, a system that is beyond 35 miles of any television station. There are no restrictions on them. They can carry as many distant signals as they can physically bring in.

Mr. PATTISON. They can microwave them?

Mr. SUMMERS. Yes. They have some "must carry" provisions—there are certain stations they have to carry. In the top 50 markets cable systems are permitted to carry three network stations—and first they have to draw locally, obviously—and three independent stations.

And, in addition, they can carry two independent stations, but if in fulfilling their quota of three independent stations they have to bring in any independent stations to make that third independent station, then those they bring in count against that additional two.

You can always get two independents you do not have, but when you have to bring some in to make your quota of three and three, then those you bring in count against those two additional.

It is a little complex. In the second 50 markets, it is three network, two independents. Again, you are allowed two additional independents but if you bring in an independent to make your quota of two independents, it counts against the two additional that you are always entitled to.

In markets over 100, systems are entitled to three network and one independent.

Mr. PATTISON. If we should pass this bill, and then the FCC should change its rules to provide for two additional independents, or something like that, there is nothing in our bill that would—the compulsory license would still apply as far as our bill is concerned?

Mr. SUMMERS. As far as your bill is concerned, it is open-ended. And, if the Commission, after enactment of this bill, allowed additional signals, distant signals, they would automatically come within the compulsory license. That is contrary to the Consensus Agreement. That is something we are concerned about.

Mr. PATTISON. How would you resolve that? We could not very well resolve it in our bill, could we?

Mr. SUMMERS. I would think so. You could simply take the provision of the Consensus Agreement that says the compulsory license is limited to the signals that are authorized by the FCC in 1972, and simply insert that in your bill.

It would be clear, then, that any additional distant signals that are authorized would be subject to full copyright liability. That is what the cable people agreed to.

Mr. PATTISON. I suppose we could do that, but we would end up locking the FCC into a position.

Mr. SUMMERS. It would not really be of any concern to the FCC. If they wanted to authorize additional distant signals, they could go ahead and do it, and then the cable people, in terms of those additional distant signals, would simply negotiate in the marketplace with the cable proprietors just like broadcast stations do, for the right—whatever it costs—to carry those additional signals.

We do this with the music people all the time.

Mr. PATTISON. It is my understanding that—the question I asked earlier today, that the broadcasters are allowed or authorized to bring suit, even though they are not the copyright holder?

Mr. SUMMERS. If it is provided in the contract.

Mr. PATTISON. I think that that is in the statute.

Mr. KASTENMEIER. In the proposed bill. That is what I was asking about.

Mr. SUMMERS. Right. We favor that provision.

Mr. PATTISON. I know you do, but could you give me some rationale for that? In other words, normally the only person who could bring an infringement suit is the owner of the copyright.

In this particular case, the broadcaster would be bringing an infringement suit, even though the copyright owner has no interest in it. The cable people are concerned about that.

Mr. SUMMERS. They are concerned about it, but they agreed to it in the Consensus and agreed to support legislation that provided just as this bill does.

I think you touched upon a very important item, just there, when you said the copyright proprietor might not be interested. That is very true, he might not, because to him one particular market where a cable operator is infringing, violating the rules, may not be important to him. But, believe me, it is very important to the station in that market that pays a lot of money to get a movie, or to get a series, and suddenly finds he is not getting the protection that the FCC rules permit him. I think it is extremely important that he have the right to enforce that right, especially where the proprietor may not believe it worthwhile to go to court to protect that copyright.

Mr. PATTISON. No more questions.

Mr. KASTENMEIER. I just have one or two questions.

We have been talking about distant signals, and the concern of broadcasters and maybe copyright holders, particularly as to movies and series, so we have been discussing that.

How about sporting events? That is, professional sports? We are going to have some testimony on that, but is this not an equally serious area?

And, are the parties, more or less, in the same position as, let us say, the networks or independent stations are with respect to motion picture associations, or the Association of Motion Pictures and Television Producers?

That is to say, are the baseball clubs copyright holders of the games shown, or retransmitted, or shown later, or whatever, in terms of these various markets?

What I am asking is, are the legal roles played by professional sports teams in providing programs for broadcasters the same as motion picture producers?

Mr. SUMMERS. No, I do not think so, Mr. Chairman. I think they have a much more fragile commodity that they own. Unlike motion pictures and series, sports are sort of a one-time, instantaneous program. Therefore, I think you will find we agree with probably most of what the sports people will testify to today.

We believe that sports are in a different category and deserve protection, outside the compulsory license; that there should be full copyright liability for sports because of the very fragile, short nature of the life of the program that is being transmitted.

Mr. KASTENMEIER. One of my questions is who, in fact, is the copyright holder? Who is the creator, author, of this work? In the case of a professional baseball game, transmitted over, let us say, a network instantaneously, whether it is ephemerally recorded or not?

Mr. SUMMERS. Well, I guess the club, or the league, is the copyright holder, but the station has purchased the right to broadcast that game, usually at a very large sum of money.

If those games—the interest in those games—is diluted in the local market by the importation of other games of the same sport from quite a great distance away, then that affects the value of the rights that the local station has purchased.

And, therefore, we are very much concerned about this.

Mr. KASTENMEIER. I appreciate that, Mr. Summers.

Thank you, very much, for your testimony today.

Mr. SUMMERS. Thank you, Mr. Chairman.

Mr. KASTENMEIER. We would like to welcome the Commissioner of organized Baseball, Bowie Kuhn, waiting patiently all day.

[The prepared statement of Mr. Kuhn follows, as well as the statement of the National Basketball Association:]

STATEMENT OF BOWIE KUHN, COMMISSIONER OF BASEBALL

INTRODUCTION

I appear here today on behalf of Professional Baseball, including 23 Major League teams and more than 110 Minor League Teams. My remarks are addressed to H.R. 2223—the Copyright Revision Bill—as it applies to professional and amateur sports, commercial broadcasters, and cable television operators.

The central theme of my statement is the necessity for action—either as a result of Congressional legislation or Federal Communications Commission ("FCC") rulemaking—limiting the wholesale, unrestricted and unconsented cable importation of distant signal sports programming into Major League markets, Minor League cities, and team network viewing areas. Our great concern is that wholesale cable importation of distant sports signals under the compulsory license provisions of this Bill can lead to *less*, rather than *more*, sports programming for the American public.

Section 111(c) of H.R. 2223 would permit any broadcast signal to be retransmitted by means of a cable television system, where permissible under the

FCC's rules, as long as the CATV user paid a copyright fee to the program originator. Thus, the issue of concern to professional sports centers on whether, and to what extent, cable TV operators should have a compulsory license to pick up and transmit at will, across the country, broadcast signals of sporting events. Cable has asked for the right to transmit sports signals without the permission, or even directly contrary to the interests, of the sports teams and broadcasters involved. This, of course, is a right not possessed by over-the-air broadcasters.

Currently, there is an FCC rule-making proceeding in progress which is reviewing this area. However, the Commission's proposed distant signal/sports rule is directed to only one of the issues associated with distant signal sports programming—same day, same game protection of sports teams' home games. It totally fails to deal with the paramount aspect of the distant signal/sports problem—the unfair competitive position which has been forced upon television stations and suppliers of copyrighted sports programming that are subjected to cable's importation of distant sports signals without consent of the broadcasters or the sports entrepreneurs.

LARGE NUMBERS OF BASEBALL GAMES ARE TELECAST EACH YEAR ON BROADCAST TELEVISION

Last year, more than 190 television stations carried more than 1,100 games to fans across the country. In addition to the network broadcasts, which include such feature events as the Monday Night Games and post-season events, each club provides local broadcasts of its games over team network stations. The total number of games telecast to the public over team networks in each of the last five years is set forth in Exhibit A.

CABLE THREATENS TO DISRUPT THE CURRENT PATTERN AND FREQUENCY OF TELEVISED BASEBALL

Historically, Baseball has sold television rights at two levels—locally and nationally. The national rights are sold through the Commissioner of Baseball and include the World Series, All-Star Game, League Championship Series and Saturday and Monday Games of the Week. Baseball has no objection at all to CATV systems carrying these games throughout the country.

Baseball's problem develops at the local level where each club sells varying numbers of its games for exclusive regional telecasts.

Promiscuous importation into a team's home territory of distant sports signals by cable television permitted by Section 111—whether a team is playing at home, on the road or, indeed, not even playing on that date—foreshadows a grave disruption of the present system of Major League Baseball. The most immediate impact is upon the marketability of a baseball's television package at a time when there is no shortage of televised baseball games.

The FCC's general distant signal carriage rules, 47 C.F.R. § 76.51, *et seq.*, Subpart D, offer totally inadequate protection to a club experiencing an oversaturated market in which to promote its events.

One development has recently come to light, which provides an actual illustration of the disruption, provoked by unrestrained distant signal importation, on the sale by Baseball clubs of the rights to their property. In 1975 the Boston Red Sox consummated an agreement with WSBK–TV in Boston, Massachusetts for the sale of their television rights. WSBK–TV, a UHF station, made a considerable expenditure for what it and the Red Sox thought was the purchase of exclusive television rights to Baseball in the Boston market. The station planned to feature the Red Sox games in an attempt to improve its viewer ratings. Both the station and the Red Sox were dismayed to discover that the viability of their television package was undercut by eleven cable systems within 35 miles of Boston authorized to carry WPIX–TV, the New York Yankees station, and WOR–TV, the New York Mets station. *See* Exhibit B. WSBK–TV and the Red Sox will be forced to bear the unfair competition in their home territory of approximately 200 Mets and Yankee games a season, over Boston cable systems that carry the New York games without consent and without bearing the expense of compensation.

Indeed, under the present provisions of Section 111, when the Yankees are playing at Boston, the Boston cable systems will import the Yankee television signals from New York in direct competition with the gate for the Red Sox-Yankee game.

A study Baseball conducted, examining all new cable authorizations granted between March 31, 1972, and March 31, 1973, reflected the sustained and pervasive

intrusion by cable of distant sports signals directly into the heart of Major League territories. It noted that, of the 304 cable systems authorized in that period to operate in Major League home territories, 171—over 55 percent—were granted permission to import the distant signals of television stations broadcasting the games of a competing baseball club.

We have further confirmed the serious harm cable poses for broadcasters and Major League clubs. Factbook Research, Inc. of Washington, D.C. was asked to tabulate CATV systems carrying eleven flagship stations which originate baseball games. The stations selected were chosen to achieve a broad regional representation. The stations were: KTTV, Los Angeles, Cal.; KBHK-TV, San Francisco, Cal.; WGN-TV, Chicago, Ill.; WBZ-TV,[1] Boston, Mass.; WTCB-TV, Minneapolis, Minn.; KBMA-TV, Kansas City, Mo.; WOR-TV and WPIX, New York, N.Y.; WPHL-TV, Philadelphia, Pa.; KDKA-TV, Pittsburgh, Pa.; KXAS-TV, Fort Worth-Dallas,[2] Tex.

This recent study shows that more than 13,000 cable systems currently are picking up the baseball signals of the thirteen originating stations. These systems serve more than 5.8 million subscribers. However, the most significant statistic is that 270 cable systems distribute competing distant signals of baseball games within 75 miles of Major League cities.[3]

SUMMARY OF STUDY BY FACTBOOK RESEARCH, INC.

Channel	Total number of cable systems carrying telecast signals	Total number of cable subscribers	Total number of signals from other clubs carried by systems within 75 miles of cities [1]
KTTV-Los Angeles	164	757,751	75
KBHK-San Francisco	86	544,366	0
WGN-Chicago	101	325,479	15
WBZ-Boston	87	204,882	0
WTCN-Minneapolis	80	155,610	0
KBMA-Kansas City	66	152,705	0
WOR-New York City	195	1,186,383	72
WPIX-New York City	215	1,274,936	74
WPHL-Philadelphia	101	623,800	58
KDKA-Pittsburgh	175	480,065	14
WBAP-Fort Worth-Dallas	46	120,567	0
Total	1,316	5,826,544	270

[1] Includes only systems carrying distant signals. This excludes the situation where the cable system carrying another team's games, the other team's originating broadcast television station and the home team's over-the-air station are all within the same market.

This study demonstrates the very significant present distribution of distant sports signals. When combined with the earlier study of new cable authorizations and even a conservative projection of the number of systems authorized to operate which will start up in the not-too-distant future, it provides a solid basis for our concern with the unfair competition which cable poses for broadcasters and sports entrepreneurs.

Thus, in the absence of any more protection than that offered by the FCC's general distant proposed signal carriage rules, a massive invasion of Major League home territories by cable is virtually inevitable. Most Major League clubs are located in or near cities which are in the "top 50" television markets. Under the FCC rules, in addition to the signals of the three networks, cable systems in the "top 50" markets may carry signals from as many as three independent broadcast television stations. Cable systems in "second top 50" markets

[1] As of the 1975 baseball season WSBK-TV will be carrying Boston's games.
[2] This station's call letters were WBAP.
[3] This figure of 270 systems is composed only of those signals that could truly be classified as distant. Therefore, any cable system, within 75 miles of a home team broadcast television station, carrying the signal of another team's over-the-air station that itself is within 75 miles of the home team station, is not included in this figure. For example, a cable system within 75 miles of KBHK-TV, the San Francisco Giants' station, carrying the nearby Oakland A's team station, KPIX-TV, is not included in the figure since, for the purpose of this study, it is not a distant signal.

are permitted to carry two independents. Many of the most popular independent stations selected for carriage are flagship stations for team networks.[4]

The influx into a given home territory of a multitude of cable-transmitted games inevitably will decrease the value of all games. Consequently, teams can expect to receive less money for the sale of their television rights,[5] while simultaneously experiencing a drop-off in home game attendance. Such a phenomenon would be in part attributable to the fact that sports events are unique among television fare. Once a game has been played, its value is, for all intents and purposes, spent.[6] Thus, if a baseball team expects any returns, they must be generated at the time the game is actually played or initially telecast. When a home team is playing on the road and telecasting its game back to its home city, and a competing game is brought in by cable as a distant signal, the value of the home team's telecast is lessened.

Baseball simply cannot afford this arbitrary diminution of its revenues. Our most recent data indicate that one-fourth of all team income is from broadcast revenues. When one also realizes that *over one-half of the major league teams lost money last year*, it becomes apparent that any severe diminution of broadcast revenues can be devastating.

Beyond the immediate impact of cable on television revenues, there is the added factor that in many markets sports programs may be reaching a saturation point. Indeed, such a viewer-saturation effect can have an impact on home game attendance, since the increased availability of competing games by cable could satisfy a fan's desire to attend the live event.

Further, cable's importation of distant signals threatens Baseball's minor league organizations which provide live professional competition in more than 100 cities across the nation. Almost *11 million fans* enjoyed the 6,791 minor league baseball games played last year.[7]

Protection of minor league gate attendance is essential to permit the continuation of this important local community activity. Also, the minor leagues are the central source of young talent for the major leagues; the major league teams spend more than $25 million per year in player development. Without a viable minor league system, the majors could expect to suffer from severe diminution of player quality, fan apathy, and, ultimately, a severe dilution of the skill level of major league teams. The minors, which are already subsidized in large part by the major leagues, are likely to suffer even greater home gate losses if forced to compete with cable-imported major league games.

We are fearful that the minor leagues cannot survive without some measure of protection from unconsented cable importation of distant signals. Significantly, home gate protection for minor league clubs within a limited geographical area is totally consistent with established Congressional policies.

Further, most of the major league teams televise their games widely over team networks. Just as the home gate and the value of televised games in a team's home territory would be reduced in value by a proliferation of cable distant signals of competing games, so also would the value of the rights of the stations which widely carry the game on the team networks. Weaker, less attractive teams would bear a disproportionate share of the loss, compounding the problems associated with their already uncertain financial outlook.[8]

THE PROPOSED SOLUTION

Baseball believes that a satisfactory resolution of the problems fomented by distant signal importation can most appropriately be accomplished through the Copyright Revision Bill. The power of a program producer to exercise control over his property is a logical component of any copyright scheme. Monetary compensation alone, as is provided by the compulsory licensing portion of Section 111

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[4] *See* Exhibit C.

[5] In 1969 more than 25 percent of Baseball's total operating revenues were derived from the sale of broadcast rights. *In re Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television and the Carriage of Sports Programs on Cable Television Systems* (hereinafter "Amendment of Part 76"), Docket No. 19417, Comments by the Commissioner of Baseball at 14 (1972).

[6] *Amendment of Sections 73.643(b)(2) and 74.1121(a)(2) of the Commission's Rules and Regulations pertaining to the showing of sports events on over-the-air subscription television or by cable casting, First Report and Order*, Docket Nos. 19554, 18893, F.C.C. 75-369, at 16 (released April 4, 1975) (Robinson dissenting).

[7] The 11 million figure includes attendance in the Mexican League; the total of 6,791 games does not include those played in the Mexican League.

[8] *Cf. United States* v. *National Football League*, 116 F. Supp. 319, 323–25 (E.D. Pa. 1953).

of the Copyright Revision Bill, is not a sufficient solution to this problem as far as Professional Baseball and other sports are concerned. It is highly unlikely that any system of copyright royalties could reimburse the public, the broadcasting television industry or Professional Baseball for their collective losses.

Aside from the immediate impact of distant signals on over-the-air television and Baseball, ultimately, the public will suffer the most. The proposed law could force sports to cut back substantially on the number of games available over the air and require that sports look to alternative forms of distributing their games to the public. It should be perfectly apparent that Baseball strongly prefers the present system which permits over-the-air telecasts of so many games.

For the reasons set out above, compulsory licensing as proposed in Section 111, without the imposition of restrictions such as those proposed by Baseball—whether as a result of Congressional or FCC action—will seriously impair the vitality of amateur and professional sports and their relations with over-the-air broadcasters. While the factual situation we discuss pertains specifically to major league baseball clubs, the general picture presented applies to all professional sports leagues and to amateur sports as well.

A persuasive case can be made in support of the position Baseball advanced in the earlier Senate hearings on this matter—that the copyright owner of sports programs should retain the *same full* control over the distribution of his product by cable television that he has in the instance of over-the-air television. However, in a spirit of compromise, and in an attempt to assist in a prompt resolution of this matter, we have proposed a significant limitation on sports' control of their product vis-a-vis cable—a proposal which will still recognize the vital interests of telecasters and sports program originators. We believe that this compromise proposal can furnish the basis for a prompt and equitable resolution of this issue.

The Baseball compromise is tailored to the legitimate and essential interests of sports, cable, and broadcasters. It has five elements:

First, there should be a 75-mile zone around major league cities into which cable could not import distant signals on an unconsented basis. This area surrounding major league cities is preeminently important to professional sports. A 75-mile zone defines, at the very minimum, the drawing area for home games.

The value of the telecaster's programming, of course, is dependent upon its exclusivity in the market. It is self-evident that no competing telecaster in the market has a compulsory license to bring in competing games; no cable competitor should have that power. Since the flagship station makes the major contribution to the sales value of a team's television package, it is vital that it not be subjected to devastating, uncontrolled competition from cable television.

Second, we also recommend a twenty-mile zone of protection around minor league cities on the day a team is playing at home. This reflects the legitimate interests of home gate protection recognized in the Sports Broadcasting Act of 1961, exempting the pooled network broadcasts of Baseball and several other professional sports from the antitrust laws.

Third, a thirty-five-mile zone of protection (or Grade A contour) should be imposed around stations on a team broadcast network on the same day that a given station is telecasting a game. This protection is essential to protect a broadcaster from a cable system's importing, on an unconsented basis, competing games which would dilute the value of the telecaster's programming. The Commission, in its recent pay cable *First Report and Order*, established that the development of cable services will satisfy the public interest standard only if it is done in such a fashion that programming on "conventional advertiser supported television broadcast stations" does not suffer a consequence.

Fourth, all cable systems as they existed as of March 31, 1972 should be grandfathered. Cable operators were clearly warned by the Commission as of that date that their activities would be subject to the Commission's sports rule in this proceeding. Such a grandfather provision would protect well-established cable operations which serve the rural and mountainous areas of our country that require cable to provide adequate programming.

Fifth, we also recommend no restrictions on cable picking up a sports program which is distributed on a nationwide basis. Thus, cable could carry the World Series, the All-Star Game, the Super Bowl, Monday Night Football, etc. The only limitation would be that cable could not carry the game into specific team localities where network broadcasters cannot do so under relevant legislation.

With the exception of the limitations listed above, cable would be free to carry distant signals in accordance with the general Commission rules. The Baseball compromise is designed to recognize the legitimate interests of all

three concerned parties—cable and its subscribers, broadcasters and their viewers, and the owners of copyright sports programs and fans of major and minor league teams.

It is most important to emphasize that this compromise proposal does not involve a "blackout" of sports programming. Rather, what is involved here is simply the right of a program originator to determine when and where its property is to be made available. A broadcaster has no compulsory license permitting him to import a telecast of any given sports contest into a community. Certainly, no one would call it a "blackout" because the broadcaster must negotiate in the first instance with the sports entrepreneur. There is, likewise, no "blackout" of games carried by cable. The issue is whether cable should have compulsory license as a matter of law to import distant signals over the objections of the local broadcaster and the sports entrepreneur.

EXHIBIT A

NUMBER OF MAJOR LEAGUE BASEBALL GAMES TELECAST ON BROADCAST TELEVISION, 1970–74

	1970		1971		1972 [1]		1973		1974	
	Home	Away	Home	Away	Home	Away	Home	Away	Home	Away
Atlanta Braves	0	20	0	20	0	20	0	48	0	58
Baltimore Orioles	7	45	6	45	8	44	8	44	9	43
Boston Red Sox	26	30	27	29	27	35	17	48	22	45
California Angels	0	26	0	25	0	26	0	30	0	25
Chicago Cubs	81	63	81	67	81	67	81	67	78	65
Chicago White Sox	81	48	81	48	81	([2])	81	48	74	51
Cincinnati Reds	5	30	5	29	35	([3])	5	30	1	30
Cleveland Indians	19	30	19	29	19	29	0	32	0	40
Detroit Tigers	11	29	11	29	11	29	12	28	10	30
Houston Astros	9	14	0	15	0	14	0	20	0	20
Kansas City Royals	9	26	0	25	2	24	0	28	0	35
Los Angeles Dodgers	1	20	1	24	0	22	0	22	0	20
Milwaukee Brewers	10	16	9	17	7	26	10	20	10	20
Minnesota Twins	4	46	4	46	4	46	0	30	0	30
New York Mets	75	42	73	43	68	49	58	54	51	69
New York Yankees	45	45	51	49	43	35	37	32	40	37
Oakland A's	0	25	1	25	0	25	0	22	4	17
Philadelphia Phillies	17	40	17	53	18	50	24	46	23	42
Pittsburgh Pirates	0	38	0	38	0	38	0	38	0	38
St. Louis Cardinals	0	26	0	25	0	26	0	29	0	29
San Diego Padres	0	20	0	18	0	22	0	0	0	0
San Francisco Giants	0	29	0	18	0	17	0	22	0	20
Texas Rangers [4]	0	42	6	34	5	19	0	22	0	23
Total	400	740	392	751	379	741	333	760	322	787

[1] Figures for 1972 came from the Sporting News, April 8, 1972, at 33–34.
[2] Includes at least 41 away games.
[3] No breakdown of this figure into home and away portions available, however, given the 1970 and 1971 figures, the 35 total figure was probably composed of 5 home and 30 away games.
[4] This team was located in Washington, D.C., during 1970 and 1971.

EXHIBIT B

WARNER CABLE OF MASSACHUSETTS INC.,
Boston, Mass., February 26, 1975.

DEAR SUBSCRIBER: Warner Cable has some exciting news for you!

Effective this Spring, Warner Cable will bring you by microwave the two independent New York channels, WOR–TV, Channel 9, and WPIX–TV, Channel 11. This will mean:

44 additional full-length movies, on the average, *each week!*

Great added sports coverage:

The New York Yankees (baseball)
The New York Mets (baseball)
The New York Knicks (Basketball)
The New York Nets (basketball)
The New York Rangers (hockey)
The New York Islanders (hockey)
The New York Sets (World Team Tennis)

14 additional comedy series, on the average, each week.

7 additional hours of drama, on the average, each week.

It's really an exciting package! And remember—these are two of the outstanding independent stations in the United States, not just more of the same network-affiliated programming.

A new channel guide, for use when the New York channels become available, is enclosed for your convenience. Our scheduled effective date for these channels is mid-March, barring any technical delays.

At this time, we also have to report that inflation has severely affected Warner Cable, as it has every other business. As a result of spiraling costs, it is necessary to propose rate adjustments in accordance with the rules of the Massachusetts Community Antenna Television Commission. Determinations as to our rates will be made by the Issuing Authority of each municipality we serve, following public hearings held by the Authority at a time and place to be announced at a later date. A copy of our proposed rate schedule is on the other side of this letter.

I wish to assure you once again that we at Warner Cable are determined to maintain our high standards and to continue to improve our service to our subscribers. The addition of the two New York channels reflects this determination. We are confident you will be as enthusiastic about them as we are.

Our best wishes for continued great viewing on Warner Cable!

Sincerely yours,

JOHN W. FRENNING,
Public Affairs Manager.

[From the Boston Sunday Globe, Apr. 20, 1975]

SPORTS REALLY STARTING TO OVERFLOW—REASON IS CABLEVISION

SporTView/JACK CRAIG

It has finally happened. That mysterious medium, cablevision, has landed with a bang on local sports.

Some 32,000 households in six Greater Boston cities will be able to tune in the Mets and Yankees television schedule this season, for a total of 172 games.

The action results from the importation of WOR–TV and WPIX–TV in New York City. The former carries the Mets, the latter the Yankees. In addition, WOR–TV picks up the road games of the Rangers and Islanders, Knicks and Nets, probably the WTT Sets, and later in the summer preseason games of the Giants. In fact, if the New York winter teams did not bomb out of the playoffs so quickly, the sports cup would be overflowing even more.

The saturation is taking place in some 9000 homes in Somerville, 6700 in Medford, 5600 in Malden, 4800 in Everett, 3000 in Chelsea and 2800 in Winthrop. Each of these cities has a cable company that is part of Warner Communications, a national corporation underwriting pickup of the New York signals at a cost of about $1000 a month.

By late summer the two New York stations are expected to be part of the cable service of Colonial Cable, which operates in Revere, Woburn, Stoneham and Burlington in approximately 10,000 homes.

In Fitchburg, Gardner and Leominster where Teleprompter is the parent company, the New York stations already have piped in to 8500 homes and that cable system is expected to link up shortly in Worcester.

The two New York stations are naturals for cable throughout the East because of their relative closeness and the fact they are strong independents which emphasize sports.

Network affiliate stations are unattractive because they offer largely duplicate programming with local stations, and this is prohibited by the Federal Communications Commission.

The Red Sox and Ch. 38 have reason to be unsettled by the arrival of so many Mets and Yankees games. There are no rights fees involved to either the local or out-of-town teams or stations involved. As cable inevitably grows there will be siphoning of TV revenue that is the underpinning of sports franchises. In fact, three Sox-Yankee games at Fenway this season not on Ch. 38 will be carried to local cable hookups via WPIX–TV.

Major league baseball has filed a proposal, and the NHL soon will follow, asking for a ban on importing distant signals within 75 miles of a big league team, and within 20 miles of a minor league city. Also, the incoming games would be prohibited when the local team is at home, for either a day or night game.

These rules seem much too strong for adoption by the FCC, but the subject probably will be resolved within the next few months by the Federal agency. In fact, the deadline for filing opinions is in two days.

However, with cable companies making heavier and heavier investments nationally, and more and more families buying the service at about $5 a month, the difficulty in turning back the rules increases. After all, the FCC members are creatures of Washington politicians, hardly likely to desert their constituents on behalf of television stations and powerful sports franchises.

Of course, the cable industry is not being altruistic. In an area in which improved reception is not a key to buying it, something extra must be provided. And in this area, sports is that something.

The FCC is aware that most sports teams, however, want to make use of pay cable, that offshoot of cablevision, which would reduce free telecasts and require fans to pay about $5 a month for a special channel to watch games, with the clubs getting a piece of each subscriber's money.

Steve Fredericks will become permanent host of TEX's new Sportswatch, daily 4–7 p.m., beginning April 23, giving up his job as sports director at WEEI. His temporary—and perhaps permanent—successor at WEEI will be Roy Reiss . . . The WBZ Radio and Ch. 4 decathlon-style Good Sports Competition, divided more equitably this year, lured more than 800 entries in the first 10 days of promotion, far ahead of last year's total . . . The Globe's basketball man, Bob Ryan, is blossoming on radio, as co-host each Saturday morning (11 a.m.) of Station WILD, a basketball-oriented show and with morning reports on WMEX after each Celtics playoff game.

EXHIBIT C

Local Clubs Regional Television Networks[1]

Oakland Athletics: KPIX—San Francisco; KTXL—Sacramento; KOLO—Reno; KMTH—Fresno-Visalia.

California Angels: KTLA—Los Angeles; KABC—Los Angeles; KCOP—Los Angeles; KHS—Los Angeles, KNBC—Los Angeles; KNXT—Los Angeles; KTTU—Los Angeles.

Baltimore Orioles: WJZ—Baltimore; WTTG—Washington; WBAL—Baltimore; WRC—Washington; WMAL—Washington.

Boston Red Sox: WSBK—Boston; WTEV—New Bedford; WWLP—Springfield, Mass.; WVNY—Burlington, Vt.; WGAN—Portland, Me.; WGAM—Presque Isle, Me.; WABI—Bangor, Me.

Detroit Tigers: WWJ—Detroit; WKZO—Kalamazoo-Grand Rapids; WJIM—Lansing; WNEM—Flint-Saginaw-Bay City; WWTV Traverse City; WWOP—Sault Ste. Marie; WTOL—Toledo; WKJG—Fort Wayne.

Kansas City Royals: KBMA—Kansas City, Mo.; KCBJ—Columbia, Mo.; WIBW—Topeka, Ks.; KMTC—Springfield, Mo.; KMTV—Omaha, Neb.; KOLN—Lincoln, Neb.; KAYS—Hays, Ks.; KLOE—Goodland, Ks.; KGIN—Grand Island, Neb.

New York Yankees: WPIX—New York, N.Y.; WDAU—Scranton, Pa.; WBJA—Binghamton, N.Y.; WSYR—Syracuse, N.Y.; WSYE—Elmira, N.Y.; WWNY—Watertown, N.Y.; WUTR—Utica, N.Y.; WHCT—Hartford, Conn.; WRGB—Schenectady, N.Y.; WATR—Waterbury, Conn.

Atlanta Braves: WTCG—Atlanta, Ga.; WHMA—Anniston, Ala.; WBMG—Birmingham, Ala.; WTVY—Dothan, Ala.; WAAY—Huntsville, Ala.; WCOV—Montgomery, Ala.; WCFT—Tuscaloosa, Ala.; WJKS—Jacksonville, Fla.; WCIX—Miami, Fla.; WSWB—Orlando, Fla.; WJHG—Panama City, Fla.; WEAR—Pensacola, Fla.; WTOG—St. Petersburg, Fla.; WALB—Albany, Ga.; WJBF—Augusta, Ga.; WYEA—Columbus, Ga.; WCWB—Macon, Ga.; WJCL—Savannah, Ga.; WGNO—New Orleans, La.; WRET—Charlotte, N.C.; WFMY—Greensboro, N.C. WRAL—Raleigh, N.C.; WCIV—Mt. Pleasant, S.C.; WIS—Columbia, S.C.; WSPA—Spartanburg, S.C.; WRCB—Chattanooga, Tenn.; WKPT—Kingsport, Tenn.; WTVK—Knoxville, Tenn.; WNGE—Nashville, Tenn; WRT—Roanoke, Va.

Chicago Cubs: WGN—Chicago, Ill.; WTVO—Rockford, Ill.; WQAD—Quad Cities, Ill.; WCIA—Champaign, Ill.; WMBD—Peoria, Ill.; WMTV—Madison, Wis.; WFRV—Green Bay, Wis.; WKBT—Lacrosse, Wis.; WANE—Ft. Wayne, Ind.; WSJV—South Bend-Elkhart, Ind.; WLFI—Lafayette, KMEG—Sioux City,

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[1] Based on data compiled in 1974.

Iowa; WBI—Des Moines-Ames, Iowa; KCFG—Cedar Rapids; WOW—Omaha, Neb.; KOLN—Lincoln, Neb.

Houston Astros: KPRC—Houston, Tex.; KALB—Alexandria, La.; KTVV—Austin, Tex.; KRBZ—Baton Rouge, La.; KBMT—Beaumont, Tex.; KBTX—Bryan, Tex.; KZTV—Corpus Christi, Tex.; KTVT—Fort Worth, Tex.; KLNI—Lafayette, La.; KPLC—Lake Charles, La.; KVTV—Laredo, Tex.; KTRE—Lufkin, Tex.; KMID—Midland, Tex.; KNOE—Monroe, La.; WGNO—New Orleans, La.; KCTV—San Angelo, Tex.; WOAI—San Antonio, Tex.; KXII—Sherman, Tex.; KTBS—Shreveport, La.; KLTV—Tyler, Tex.; KWTX—Waco, Tex.; KRGV—Weslaco, Tex.; KFDX—Wichita Falls, Tex.

Montreal Expos: WPTZ—Plattsburgh, N.Y.

Pittsburgh Pirates: KDKA—Pittsburgh, Pa.; WJAC—Johnstown, Pa.; WTRF—Wheeling, W. Va.; WSEE—Erie, Pa.; WTAP—Parkersburg, W. Va.

Philadelphia Phillies: WPHL—Philadelphia, Pa.; WGAL—Lancaster, Pa.; WLYH—Lebanon, Pa.; WNEP—Wilkes-Barre, Scranton, Pa.

St. Louis Cardinals: KSD—St. Louis, Mo.; KFPW—Ft. Smith, Ark.; KAIT—Jonesboro, Ark.; KARK—Little Rock, Ark.; WEEK—Peoria, Ill.; WGEM—Quincy, Ill.; WICS—Springfield, Ill.; WFIE—Evansville, Ind.; WIIL—Terre Haute, Ind.; WPSD—Paducah, Ky.; KTWV—Tupelo, Miss.; KOMU—Columbia, Mo.; KUHI—Joplin, Mo.; KOLR—Springfield, Mo.; KMTV—Omaha, Neb.; KOTV—Tulsa, Okla.; WMC—Memphis, Tenn.; WGNE—Nashville, Tenn.

San Francisco Giants: KTVU—San Francisco—Oakland,; KTXL—Sacramento, Calif.; KMPH—Visalia, Calif.; KPHO—Phoenix, Ariz.; KZAZ—Tucson, Ariz.

Texas Rangers: KXAS—Ft. Worth-Dallas, Tex.; KVRL—Houston, Tex.

Milwaukee Brewers: WTMJ—Milwaukee, Wis.; WKOW—Madison, Wis.; WXOW—La Crosse,Wis.; WAOW—Wausau, Wis.; WBAY—Green Bay, Wis.; WAEO—Rhinelander, Wis.; WLUC—Marquette, Mich.

Chicago White Sox: WSNS—Chicago, Ill.; WCEE—Rockford, Ill.; WLFI—Lafayette, Ind.; WNDU—South Bend, Ind.; WAND—Decatur, Ill.; WRAU—Peoria, Ill.; WEHT—Evansville, Ind.; WANE—Fort Wayne, Ind.; WTHI—Terre Haute, Ind.; WOC—Davenport, Iowa; WTTV—Indianapolis, Ind.

Los Angeles Dodgers: KTTV—Los Angeles, Calif.; KBAK—Bakersfield, Calif.

New York Mets: WOR—New York, N.Y.; WTEN—Albany, N.Y.; WSYR—Syracuse, N.Y.

Minnesota Twins: WTCN—Minneapolis-St. Paul: KXJB—Fargo, N.D.; KXMC—Minot, N.D.; KDIX—Dickinson, N.D.; KXMB—Bismarck, N.D.; KSFY—Sioux Falls, S.D.; KXMD—Williston, N.D.; KCOO—Aberdeen, S.D.; KROC—Rochester, Min.; KCMT—Alexandria, Min.; KNMT—Walker, Min.; WEAU—Eau Clair, Wis.

Cincinnati Reds: WLWT—Cincinnati, Ohio; WLWD—Dayton, Ohio; WLWC—Columbus, Ohio,; WLWI—Indianapolis, Ind.; WSAZ—Huntington, W.Va.; WLEX—Lexington, Ky.; WLKY—Louisville, Ky.; WLIO—Lima, Ohio; WKJG—Ft. Wayne, Ind.; WHIZ—Zanesville, Ohio; WKYH—Hazard, Ky.; WIIL—Terre Haute, Ind.

Cleveland Indians: WJW—Cleveland, Ohio; WYTV—Cleveland, Ohio.

San Diego Padres: XETV—San Diego.

Statement by the National Basketball Association

The National Basketball Association strongly urges the adoption by this subcommittee of an amendment to the Copyright Revision Bill to exclude secondary transmissions of live sports events by cable systems from the compulsory licensing provisions of the Bill.

From the perspective of the National Basketball Association, the ability of its member teams to control when and where their games are broadcast is the key to the preservation of a valuable source of live entertainment as well as television broadcast material. Unlike the typical copyright holder, a professional sports team does not produce a game primarily for television viewing. Moreover, the broadcast value of a team's product perishes after the first broadcast whereas other copyright holders can anticipate additional revenues when their product is syndicated for second runs in secondary markets. Therefore even a proposal such as compulsory licensing will have a limited relevance to professional sports and will not solve the unique problem of such program suppliers. The saturation of home territories with unlimited cable transmissions of competing games will reduce vital team revenue from the home gate and, by fragmenting the potential

television audience, will also deprive teams of fair compensation for local broadcast rights.

Under such conditions, some NBA teams cannot survive. Contrary to their desire, many teams may be compelled to curtail their broadcast schedule to regain control of the distribution of their games. Thus, the unfortunate but possible net effect of increasing the sports programming available to the limited segment of the public physically and financially able to receive CATV will be to reduce the amount of local sports programming offered by free over-the-air television, and, conceivably, to reduce the number of teams competing before live audiences. Plainly, these results are not in the public interest.

The cable interests have opposed the right of sports teams to control the dissemination of their broadcasts on the ground that communities dependent on cable for sports programming will lose that programming. The National Basketball Association as well as other professional sports have repeatedly recognized the needs of these communities and have expressed approval of a grandfather clause which would protect the sports carriage right of all systems established prior to March 31, 1972, which are the systems that service these communities.

The National Basketball Association also believes it vital that Congress conclusively resolve the admittedly complex but already exhaustively examined question of sports carriage by cable television. The Supreme Court[1] has indicated that the regulation of the relationships among copyright holders, cable operators, advertisers and the public is the job of Congress. Likewise, the Federal Communications Commission has expressed a reluctance to mediate between these conflicting interests, has tended to take a narrow view of its jurisdiction in the area and, most importantly, has repeatedly sought guidance from Congress. Having undertaken the enormous task of revising the copyright laws to account for twentieth century technology, including cable television, Congress cannot consider the task to be completed until the sports/cable issue is fairly resolved.

Respectfully submitted,

NATIONAL BASKETBALL ASSOCIATION,
By ROBERT M. KAUFMAN,
MYRA J. GREEN, *of Counsel.*

TESTIMONY OF BOWIE KUHN, COMMISSIONER OF BASEBALL

Mr. KUHN. Thank you, Mr. Chairman.

I have submitted a statement to the committee which I trust you all have. In my copy, I notice that it states at the outset, that I appear here today on behalf of professional baseball, including 23 major league teams. Perhaps somebody had a prophetic view, but that is a typographical error. I do appear on behalf of 24 major league teams. That is the way your copy should read.

I have also brought with me, and submitted, a statement on behalf of the National Basketball Association. They are not appearing here, actually, today, but they have submitted a statement, and you have that.

Mr. KASTENMEIER. Without objection, that statement will be received and be made a part of the record, along with various exhibits you have attached to your statement.

Mr. KUHN. Thank you, Mr. Chairman.

I would like to take a very few minutes, really, to just touch on some of the highlights of this problem, as we in professional baseball see, and I will not follow my written statement which I hope you will have an opportunity to read.

This matter of distant signals is obviously one of very critical importance to us in professional baseball. I think I can say, generally, that this is true with respect to other professional sports, and with respect to amateur sports.

[1] *Teleprompter Corp.* v. *CBS,* 415 U.S. 394 (1974).

I think one of the—if I may just go back to what I think is sort of the fundamental of the problem—I think it is fair to say that professional baseball, and, indeed, sports in general, have done a tremendous job of providing television broadcasting to the people of the United States.

We in professional baseball are putting on the air annually almost 1,200 games a year. This means that we are actually televising through the various local broadcasting contracts that we have in our major league cities, just about 60 percent of the baseball games that we play.

And, certainly that does suggest that there is very little shortage of major league baseball on the air in the United States.

In addition, all of our games are carried—almost all of our games, with very few exceptions, are carried by radio, at home and away, so that it is fully available to the fans who follow baseball.

We also sell a national package to the National Broadcasting System through which we put on a game each Saturday, and we have a Monday night game and the World Series and the All Star game, and the League Championship Series. We are putting on, in addition, a very large amount of baseball in that way.

I think it is fair to say that everybody in the country has a very substantial amount of baseball television available to them; indeed, in some places not only do they have substantial, but an enormous amount of baseball television available to them. For instance, in New York, our two clubs there are telecasting just about 200 games annually, so we have an enormous amount of games telecast locally.

In addition to that, you have the local network telecasts in Chicago. Last year the Cubs and White Sox telecast 268 games locally, so there was an enormous number of games available to the public there.

All of this, I think, demonstrates the point I am trying to make; that we have not been backward in trying to put our product out for the public to see. I think this is an important part of the backdrop in trying to understand the position we do take on this distant signal question.

It seems to me, under these circumstances, when the cable carries baseball in places where it is not now on television, or carries baseball to other places, is what I am trying to say, they are not providing any new or novel service to the public.

The concept of specialized service is certainly not met by carrying yet more baseball to yet more places in the United States. There is, in a nutshell, plenty of baseball there. Still, we find today that there is a great many cable systems which have been authorized by the Federal Communications Commission to do just exactly this, to pick up existing baseball signals and carry them into other communities.

We made a study of the licenses issued by the Federal Communications Commission in the year following the end of the freeze. During that time, 171 cable systems in major league territories were authorized to carry baseball broadcasts from other communities. At any given point in time, this number is a very large number and it is an increasing number. So, we are not talking just about the theoretical possibilities that may come, and the theoretical possibilities I think we can project are very significant. We are talking about actual carriage today of the signals. Who knows what is coming? But today, we have 10 million homes with cable. Projections are, in the not too many

years hence, we will have as many as 22 million homes with cable. And so, the potential for carriage of existing television signals through these systems is very great.

I do not think it is unrealistic of us to wonder just what the impact of that could be, if more and more and more authority is given to cable to carry distant signals of major league baseball games.

Obviously, we would have no standing to come here and talk if there were not some potential impact on professional baseball, potential or actual impact. We think there is a very real impact on professional baseball.

First off, we see a distinct potential for damage to our local gate through more and more television coming in through cable. And you must realize that is a very important point to us, because about two-thirds of our revenue comes from gate. We have a very high percentage of our revenue which is attributable to gate.

In addition, it places in some jeopardy the level of income which we are able to get today from the sale of broadcast rights. About 25 percent of our revenue today comes from the sale of broadcast rights. And more than half of that comes from the sale of these local broadcasting rights.

We see a distinct potential for harm to the local broadcasters to whom we sell our rights. We have been in contact with these people and in many cases they are extremely concerned about the potential impact of cable. I am thinking here, among others, of the UHF stations which presently have really backboned their carriage, their general carriage of programming, onto the use of sports programming.

A station in Boston, WSBK, has really backboned on carrying the Boston Red Sox and the Boston Bruins games. They do this, as far as baseball is concerned, under an existing contract. In the city of Boston today, in the greater Boston area, there are 11 cable systems authorized to carry major league baseball in competition—and I suggest unfair competition—with the program rights which WSBK has acquired from the Boston Red Sox.

Mr. KASTENMEIER. You say authorized: authorized by whom?

Mr. KUHN. The Federal Communications Commission, under their license.

When I say that WSBK is worried, they are worried because they see these cable systems with the authority to carry the games as telecast over Channel 9 and Channel 11 in New York, where we have these 200 games, the New York Mets and the New York Yankees, that are presently being carried.

I think the question needs to be raised as to why responsible and reasonable people would even consider, under these circumstances, giving cable television a free ride on a property which has been created by professional baseball, created at very great expense by professional baseball. Surely, if the television people came to the Congress and said, we would like compulsory license to carry major league baseball, you would laugh in their faces; so would we.

For years, they have successfully purchased from professional baseball the right to carry our games. It is by reason of this that we carry almost 1,200 games locally around the United States. They come in, they pay a fair price for a property we have created. They have established a market value of great significance to them. The cable people, however, are not prepared to enter into a similar arrangement to ac-

quire these rights, but ask for a compulsory license to carry them, which would provide, at the very most, fees which would be spread over so many copyright holding industries as to be of no importance at all. It would be of nominal importance to anyone in the copyright holding end of this proposition.

Why is it that anyone would even consider their arguments where they are indeed taking a free ride on what has been created by others? The reason, it seems to me, Mr. Chairman, and gentlemen, is this: that we have here a young and struggling industry which is trying to find a place. And because of this, there is a tendency to be sympathetic with their need for this programing because they take the position that without this programing they really cannot make it in the marketplace. They need the help of the Congress to put them and keep them in business.

As far as professional baseball is concerned, we would agree that the cable systems are an important part of the communications picture in the United States. I think we would be distressed, as good citizens, if they were not able to grow and exist in the communications industry in the United States. What we do not understand—and this is the fundamental question—is why it is that professional baseball and the other sports professions and the broadcasting profession are asked to subsidize the growth of cable. We are given no control whatsoever over their use of our product.

If cable should exist, as we think it should, then it seems to us that there should be some other way wherein the growth of cable is subsidized. And certainly it is unfair to come to an industry like professional baseball and permit them, for these nominal fees, to take our product and use it in a profit-making business of their own, without our having any kind of control over that at all.

The equity or lack of equity of this, to me, is a very striking thing, and I think as you gentlemen approach your problem as legislators and how you should shape the copyright laws, I really think you have to reckon with the question of what really is fair and what is not fair under the circumstances.

Now, I might say that, as has often been suggested, the answer may be for the Federal Communications Commission to provide regulations which will take care of any possible inequity. Up to now, certainly, the Commission has not done so. The Commission is, of course, considering rulemaking in this area, but at this point, I would have to say that there is no clearcut evidence that the Commission will recognize the interests of the nonbroadcast industries like the sports industries. Indeed, it tends to be a view of the Commission that they have no statutory authority to deal with the problems of the sports industries. They are inclined to feel that this is a problem for Congress. We do not agree. We think it is a problem the Commission could deal with; but we also certainly agree it is a problem Congress can deal with, and has to very seriously evaluate.

We are faced with the problem of feeling that we should have control over products that we create, just as we do when we deal with the television industry. Still, we have to be realistic about what the situation is. After all, we talked with the people down here, we talked to people in Congress, we talked to people in the Commission, and we realize that the concept of giving sports control over its product, as in the case of over-the-air broadcasters, is not something which is, cer-

tainly in the present mood of the Congress or the Commission, is something we can expect. So we have suggested in our papers, both here and in the Commission, that there should be some compromise approach to this which fairly deals with the needs of the cable industry and fairly deals with the needs of professional—and I should say amateur—sports, because amateur sports, as you know, is very much involved in this problem. We have suggested elements of such a compromise, and here the things which we have asked you to consider and focus on, in particular, are the problems that we have in our major league territories, those areas where we deprive the major part of our attendance and from which springs the major part of our broadcast revenue as we sell it locally. This is our prime area of interest. This is of very essential importance to us.

We also have over 100 minor league cities in this country which we think should be given some consideration. In addition, we have over 190 television stations on our local networks. In other words, the Mets will not only telecast over WOR in New York, but there may be as many as 5 or 6 or 7 or 8 or 9 or 10 stations that are hooked into WOR's network. So you have over 190 stations on the local networks. We think these interests have to be protected.

Again, we do not want to be unrealistic about what is possible. We recognize that a great deal of cable has gone into position and is carrying sports today. We think there is some reasonable area where grandfathering can be considered to protect the cable interests which have been developing in recent years. Of course, a key date in our mind is March 31, 1972, when the freeze was broken by the Federal Communications Commission and licenses were issued to cable, all of which, of course, was subject to whatever ultimate rulemaking might be forthcoming with respect to the carriage of sports signals.

Let me come to what I consider the dreary part of the problem.

We have to face the possibility that it may be difficult, it may not be possible—I hope it is not so—for us to get the kind of reasonable control which we think we, as the copyright holder, should have.

What alternatives are we faced with if we find that our markets are flooded with cable over which we have no control? One of the things we would have to consider is the approach to the problem taken by the National Football League. The National Football League has a different problem here than we do, because the games in the National Football League are carried totally on network television, and as such, under the existing rules of the Federal Communications Commission, are largely exempt from carriage by cable. Since we carry our games very significantly over independent stations, such as WOR in New York, and WKIX, WGN in Chicago, and so forth, our games are subject to being carried through distant signals, under the existing FCC regulations.

I might say, and this, again, would be true of both hockey and basketball, it seems to me that in dealing with the equities of the problems, one thing you gentlemen have to consider is the fact that the administrative agency's regulations have protected one sports industry from carriage and do not, in fact, protect the other sports industries from the same carriage. I think that is another problem that lurks in here that creates an additional difficulty for us in professional sports, other than football and amateur sports.

I think it is inevitable, in addition, that were this cable carriage to develop as we foresee it surely will, that we will be faced with more San Diego's.

What do I mean when I say that?

San Diego is the one major league club we have today that does not sell any local television. It is through no wish of its own it does not do so; there is no market at the present time for the San Diego club to be able to do that.

One of the things that keeps the San Diego club in place, a going business, down there is the fact that a man of considerable wealth has purchased it and is able to finance a club which otherwise has financial difficulties because it has no local television revenue.

So, that what you can anticipate is, as our local broadcasters find the competition—unfair competition from free-riding cable—more than they want to contend with, I am afraid we are going to find—this would probably be true particularly in our weaker broadcast markets—that we are not able to sell television locally as we presently cannot already in San Diego.

What I fear flows from this is several things.

First off, you can see an enormous cutback in the amount of games being televised today, baseball games being televised today in the United States.

Second, the position of our clubs where we have the weaker broadcast market. The stability would be jeopardized. I think what you would see is a tendency for baseball to look out for large international markets which could, through attendance as well as broadcasting, support these clubs, as opposed to the weaker cities that we now have in the United States where very small local revenue has been derived. Washington is a classic example. One of our problems here, which I hope we will be able to solve in the future, but I am worried about it, is on this very point we are discussing. This is one of our two or three weakest broadcast markets, and there was a disparity between this market and our top market of maybe $1.5 million. This crowd, with a disparity like that, as against the most profitable club, was trying to compete with those other clubs. The difficulty I think is very apparent in what they run into. So, I see a real danger in some of these small broadcast markets. Kansas City certainly would be another one. There are others.

In general, I think that we would have to look to try to cut back the amount of television we do in order to minimize the amount that can be carried at a distance by cable, and try to find other sources of revenue to balance our books. Keep in mind, also, something I think very many people are skeptical about. They should not be because it is quite true, and that is, in any given year half of our clubs in professional baseball are losing money. Today, as baseball grows, the popularity and overall attendance grow; our ratings grow. Everything you look at just about grows. In baseball everything grows except profitability. The bottom line is getting worse and worse in baseball.

We are under severe financial pressures at the present time. This is a grave difficulty we have in baseball, and it too becomes a factor then in this problem. We have to look for ways to try to increase the revenues which we presently have.

One area where you obviously would see pressure, there is no question you would have to see pressure on the ticket prices. Baseball has maintained the lowest ticket prices of any sport. Probably the best entertainment buy in the country is professional baseball. You can still buy tickets for $1.50 or $2, and sometimes less than that.

This is an area where you obviously have to turn to try to generate the revenue which is necessary to combat the effect on our gate and on our broadcast revenue. The growth of cable competition—these alternative approaches, I emphasize again, gentlemen, are repugnant to us. But, realistically I would have to give you my opinion that this is the area where you would see baseball driven unless there is some kind of relief that can be given us.

I urge you very sincerely to consider what I have said here because I think the points are important. I think the problem I present you is a difficult one. But I do think there is an area of compromise that can be found here and should be found here. I certainly agree with the remark of Mr. Summers in response to the chairman's questions. That sports are in a distinctly different position from any other copyright property owners.

A moving picture can be shown over, and over, and over again. It has as many rights as it is repeated. You can have a compulsory licensing agreement that pays them and pays them. The same thing is true of music and other things that can be performed on television. It is not true of sports. You perform your baseball game once, and you never perform it again. It has no value at all after that, none at all. Once that is gone, it is gone.

We are in an entirely different position than all of the other people who appear before you and talk about copyright protection.

Thank you, Mr. Chairman.

Mr. Kastenmeier. Thank you.

One or two questions.

As certain other associations are organized, are professional sports, that is to say, the various groupings such as organized baseball, football, hockey, and basketball? Do you have an association of all organized professional sports with which you can negotiate on economic forces?

Mr. Kuhn. We have never involved ourselves with other professional sports and negotiated anything that involved commercial rights. We are very much involved ourselves with other professional sports in such things as legalized gambling. We are strong in our continuing opposition to legalized gambling, but not in the commercial area.

Mr. Kastenmeier. Has organized baseball or any professional sports, to your knowledge, attempted to negotiate with cable interests in terms of the equities you cite here in your testimony?

Mr. Kuhn. Yes; we have. We did last year. We negotiated over a period of perhaps a month or 6 weeks with a committee from the cable industry made up of various groups or persons from the different strata of the cable industry. We had thought for a while we were making some progress. But there came a time, I think, when it was felt that the Senate copyright bill was going in a certain way contrary to sports, perhaps in aspirations, where those negotiations were broken off with the cable people and have never been resumed.

We were willing, and are still willing to negotiate with them.

Mr. KASTENMEIER. My last question is you have recommendations in here in your statement, both that you made orally and in your written statement. Do you have precise statutory language which you would recommend to the committee?

Mr. KUHN. Mr. Chairman, I do not have in the papers I have given you any precise statutory language; but I would be very happy to submit suggested statutory language.

Mr. KASTENMEIER. We would be pleased to have that.

[The material referred to follows:]

ARNOLD & PORTER,
Washington, D.C., March 25, 1976.

Hon. ROBERT W. KASTENMEIER,
Chairman, House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Rayburn House Office Building, Washington, D.C.

Attention: Herbert Fuchs

DEAR CHAIRMAN KASTENMEIER: This letter is written on behalf of our client, the Commissioner of Baseball. You will recall that at the earlier hearings on the copyright revision bill there was discussion of the copyrightability of live television programing. We believe that any questions in this regard have been fully and thoughtfully discussed in the earlier deliberations of your subcommittee when it considered the revision bill almost a decade ago. Appropriate amendments were incorporated in the revision bill in 1966 and have remained in the legislation ever since.

To clarify this matter, we urge that the discussion of this issue contained in the Report accompanying the 1966 legislation, appropriately updated, be restated in the Committee Report which will accompany this year's version of the bill. We have attached the language from the 1966 report that describes fully the "authorship" and "fixation" elements of copyrighting live programing.

Best wishes,

Sincerely,

JAMES F. FITZPATRICK.

Enclosure.

ATTACHMENT A

JANUARY 5, 1976.

HOUSE REPORT 2237, 89TH CONGRESS 2D SESSION (1966), PP. 44–55

"At the hearings representatives of broadcasters and organized team sports raised a point that the bill had left unresolved: what should be the status of live broadcasts—sports, news coverage, live performances of music, etc.—that are reaching the public in unfixed form but that are simultaneously being recorded? When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes "authorship." The real question to be considered is whether there has been a fixation. If the images and sounds to be broadcast are first recorded (on video tape, film, etc.) and then transmitted, the recorded work would be considered a "motion picture" subject to statutory protection against unauthorized reproduction or retransmission of the broadcast. If, on the other hand, the program content is transmitted live to the public while being recorded at the same time, should the copyright owner be forced to rely on common law rather than statutory rights in proceeding against a community antenna operator for unauthorized retransmission of the live broadcast?

"The committee was persuaded that, assuming they are copyrightable—as "motion pictures" or "sound recording," for example—the content of a live transmission should be regarded as "fixed" and should be accorded statutory protection if it is being recorded simultaneously with its transmission. The discussions on this point, as well as questions raised in connection with computer uses, further emphasized the need for a clear definition of "fixation" that would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other

cathode ray tube, or captured momentarily in the "memory" of a computer.
"The committee has therefore added a new definition of "fixed" to section 101. Under the first sentence of this definition a work would be considered "fixed in a tangible medium of expression" if there has been an authorized embodiment in a copy or phonorecord and if that embodiment "is sufficiently permanent or stable" to permit the work "to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." The second sentence makes clear that, in the case of "a work consisting of sounds, images, or both, that are being transmitted," the work is regarded as "fixed" if a fixation is being made at the same time as the transmission."

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. While I was not here during all of your presentation, I am familiar with the material, Mr. Kuhn. I really have only one question. Your opposition, or rather, your concern in the copyright bill is substantially the same as that that has been voiced by Mr. Valenti this morning, and other people, I think, in the last several days.

You would have no objection to the cable, provided you had some kind of a royalty payment, copyright license fee arrangement. Is that the idea?

Mr. KUHN. No; actually it is not.

The motion picture people understandably take the view that there is a reasonable arrangement for compensation statutorily that would be acceptable to them. I have to tell you that as far as we are concerned, we would prefer there was no cable carriage of our game at all. We are not looking for revenue.

Mr. DANIELSON. Would you prefer it if there was no television coverage?

Mr. KUHN. No; we would not.

Mr. DANIELSON. Your objection to diffusion of the programing, then, is the medium. If it is broadcast through the airwaves, so to speak, that is OK; but if it is carried through cable, something inherently bad attaches?

Mr. KUHN. We have no objection to the coaxial cable, as long as it is in the traditional pattern of cable supplementing over the air, whether it is in grade A or B contours or the mountainous or rural regions.

Mr. DANIELSON. You are talking about the primary viewing area?

Mr. KUHN. Yes. But, when cable does not act to simply implement, let us say, channel 9 in New York, but rather carries channel 9 in New York up into New England, then we think that is a very different thing. It is not so much a matter of how it is done as the fact that it is done.

Mr. DANIELSON. It is distance that counts, then?

Mr. KUHN. It is distance, and the fact that what it then does is constitute what we think is unfair competition with what the Boston Redsox are trying to do up there. They are trying to develop a market, make the Redsox attractive, trying to sell broadcasting rights. What it intends to do, Congressman, I am afraid, is to throw baseball back into the days that I never want to see returned, when we were dominated by two or three or four very strong and rich teams. This is the halcyon days of the Yankees. These were the good days for the Yankees, but they were not such good days for baseball.

Today we have general strength among all clubs.

Mr. DANIELSON. I am trying to identify the cause of complaint. Is it the importation of distant signals?

Mr. KUHN. The importation of distant signals is certainly part of it.

Mr. DANIELSON. Is there another part?

Mr. KUHN. The other part of it is we would like, ideally, since we create the property, to control what is done with it.

There are some instances where we would like to say yes, it is perfectly proper for it to go there. There are circumstances where it is proper, and others where we think it is not.

Mr. DANIELSON. But you say you have no objection within the primary viewing area?

Mr. KUHN. Within the primary viewing area of channel 9 in New York, we have no objection; that is correct.

Mr. DANIELSON. Whether you like it or not, you are objecting to the export, or import, as you want to call it, of the signal beyond the primary viewing area.

Mr. KUHN. Yes; I am objecting to it under certain circumstances. There may well be occasions where we would be perfectly happy to have it exported.

Mr. DANIELSON. I want to know this.

What is it that baseball copyrights?

Mr. KUHN. Baseball, under this copyright law, it would be the account and impressions of the baseball games as broadcast that would be copyrighted under common law, and apart from this there is an existing common law copyright which has been recognized in the courts of this country—the same thing.

Mr. DANIELSON. Do you have any decision of the Supreme Court recognizing a copyright of a baseball game? I would like to see one.

Mr. KUHN. I would like to go back and give you some briefing on——

Mr. DANIELSON. I do not want much briefing. I have 5 minutes, and 3 of them are gone.

Mr. KUHN. I would like to submit it to you then, Congressman. I think you will find the *AP* v. *INS* case (*International News Service* v. *Associated Press*, 248 U.S. 215 (1918)) relevant.

Mr. DANIELSON. The Constitution says that you promote the progress of science and the useful arts. Baseball must either be a science or a useful art. By securing for a limited time to authors and inventors—I do not know who is the author or inventor of your baseball game—the exclusive right to the respective writings and discoveries—that is all there is in copyright.

Mr. KUHN. This new bill would expressly cover sports.

Mr. DANIELSON. We work under a Constitution, and we cannot put anything into that Constitution through legislation, nor can we take anything out of it by legislation. It could be that the courts would say you have a copyrightable property interest. I am willing to be convinced. But I must be convinced.

What is it—who obtains a copyright for a baseball game? That has to come in somebody's name. Somebody has to own the copyright?

Mr. KUHN. No. I would be following the procedures that are provided for in the statute for the fixation of a copyright. Those are detailed in the statute. I frankly do not have them on my mind, Congressman, but it is set out in the bill that you have before you.

Mr. DANIELSON. The bill before us is not law.

Mr. KUHN. Without this bill, there is no fixation of copyright because the question there is what is the next status of baseball under common law copyright.

Mr. DANIELSON. I think probably you have a problem which probably can be reached through a communications policy which is administered by the Federal Communications Commission or which could be reached through legislation. But this committee uniquely is dealing with the problem of copyright. You have a competition problem. You are trying to resolve it through copyright. I think it may be the wrong vehicle. Again, I am willing to be convinced. But I am not going to take judicial notice of anything that is not shown to me.

I have one last question. What is your objection to legalized gambling?

Mr. KUHN. I have a position that I am afraid I can only state in much too much length for the minute you have.

Legalized gambling, in a nutshell, would bring into the following of sports a great many people who do not gamble on games today.

Mr. DANIELSON. It is moral?

Mr. KUHN. It is both moral and practical, because if you bring a lot more people into gambling on sports, what you are going to have is a great deal of suspicion cast on the honesty of sports. The more gambling you have on sports, Congressman, in my judgment, the more people you are going to have saying that every time a foul ball is dropped or a ball slips away from the catcher, that that was done dishonestly. The more suspicion you have of professional sports, then the more public harm you are going to do to those professional sports and amateur sports.

Mr. DANIELSON. Would you say that applies equally to horseracing?

Mr. KUHN. No, I do not think so.

Mr. DANIELSON. Thank you very much.

Mr. KASTENMEIER. The gentleman from Illinois.

Mr. RAILSBACK. Commissioner, I want to welcome you, first of all, and ask you if there is any empirical data that would indicate the decline in attendance as a result of, for example, the Boston, Mass., incident to which you refer in your testimony. I think that would be very helpful to us.

Mr. KUHN. I wish I had some I could give you.

The problem is really too new to have developed empirical data that would be convincing on the subject at this point. We are working largely with the very strong conviction of people in professional and amateur sports and in the broadcast industry. But at this point I could not actually prove it to you.

Mr. RAILSBACK. There are two areas that concern me. One is in respect to minor league franchises. When they are playing ball, what effect would cable television have on that particular attendance?

I want to say I personally can see where, if you had 11 cable systems importing the New York Mets games, that that could have an effect. I think that certainly could have an adverse effect. But how were those 11 systems licensed to do what they did with respect to the Boston station?

Mr. KUHN. They make application to the FCC and get—it grants the license permitting the carriage of the signal of certain other stations in other cities. This is the proceeding on this.

Mr. RAILSBACK. When the FCC does that, is there any opportunity for the local station to appear and resist? Also, is there a chance for

the copyright holder to also complain or file a grievance as well—how does that work?

Mr. KUHN. I think the answer to that question is in the negative. These proceedings have been going on for some time now, as these new licenses have been granted. I believe that the answer to that is, no.

Mr. RAILSBACK. Were these new licenses granted beginning after the so-called Consensus Agreement? Had they been prevented up until that time?

Mr. KUHN. I am not sure about the date of the Consensus Agreement, but they began to be granted after the breaking of the freeze on March 31, 1972.

Mr. RAILSBACK. And, up until that time, you did not have the problem, at least certainly not to the extent or magnitude that you have had since that time?

Mr. KUHN. That is correct.

Mr. RAILSBACK. That is why you do not have the empirical data. Are you planning to develop that kind of data?

Mr. KUHN. We will develop everything we can on it. If we have empirical data, we will certainly be putting it into the hands of the people who ought to be considering this problem. I am sorry we do not have it now.

Mr. RAILSBACK. That is all, Mr. Chairman.

Thank you.

Mr. KASTENMEIER. The gentleman from New York, Mr. Badillo.

Mr. BADILLO. You do not support the bill as it stands now; is that correct?

Mr. KUHN. That is correct.

Mr. BADILLO. You would recommend the amendments which are listed in your statement on pages 15 to 18 from first through five?

Mr. KUHN. That is correct.

Mr. BADILLO. That is what you call the baseball compromise. Who comprised on that? Why do you call it the baseball compromise?

Mr. KUHN. They call it a compromise in the sense—perhaps the word is not a good one—when the copyright bill first started out, it provided that the sports interests would have control over the dissemination of their product by secondary transmissions.

As it wound its way through the editorial process, those original positions of control were eliminated, and were replaced with the language now appearing in here. So what I am saying is that our position, that we are really and fairly entitled to control, as we do with over-the-air television, has been compromised down to a position which we state here.

Mr. BADILLO. That does not mean that the cable television people have consented?

Mr. KUHN. I did not mean to imply that; they certainly have not agreed to it.

Mr. BADILLO. It is not like the Consensus Agreement, which is neither a consensus nor an agreement?

Mr. KUHN. No, sir, it is not.

Mr. BADILLO. The 75-mile zone—you say it should be a 75-mile zone in major league cities, into which cable could not import distance signals on an unconsented basis. That means you would have to consent, the baseball team, each time—is that what you mean?

Mr. KUHN. Yes. What I am saying is that if the system in Milwaukee was to carry WGN in Chicago, a Cubs game, they would have to have the consent of the clubs, just as they do with over-the-air today.

Mr. BADILLO. That would be even if there were no game at all in the city to which it is being carried?

Mr. KUHN. That would be up to the Cubs. The Cubs today, if they wanted to, could sell broadcasting rights in the territory of the Milwaukee clubs, and some of our major league clubs have done that.

Mr. BADILLO. If the clubs do not want to give the right, so that you really are giving the clubs the exclusive control—it is really not a question of consent; you are really saying the exclusive control is for the clubs?

Mr. KUHN. I would say it is a question of consent. If I may just make this point, the word blackout has been used by our friends in the cable industry very effectively in the pejorative sense, to make it appear that what we are trying to achieve is very bad, here. This is not a blackout question, any more than our control of over-the-air television is a blackout question. If it were, then presumably you would not see all the over-the-air television that you do see, and you would not see the 200 games being televised in New York City that we have today. We have not exercised our rights of control on over-the-air in any unfair way or any way that would work against the public interest, in my judgment. Nor do I think there is any reason to think we would exercise such rights in a wrong-headed sense, with respect to public interests where they do apply to cable.

Mr. BADILLO. But you want the right—if you decide to have a total blackout, you could have it?

Mr. KUHN. Theoretically, just as in over-the-air.

Mr. DANIELSON. I have been trying to understand whether you mean the control would be in the team that does the playing or the team which is resident in a city?

Mr. BADILLO. The team that does the playing. In other words, just like the word compromise is not really compromise, an unconsented basis is another way of saying total control by the team that does the playing does not want a town, at any time, because they threw them out, let's say, to have a game broadcast, it just would not happen. There is no review at all. That is what is being proposed?

Mr. KUHN. That is correct. I think it is unfair to suggest that there would be an unreasonable use of that any more than there is with the television.

Mr. BADILLO. I am suggesting that the proposal you make is one for exclusive and sole control by the team which is playing.

Thank you.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. The team that is resident in Milwaukee—does that team have something to say, under your proposal——

Mr. KUHN. No; it does not.

Mr. PATTISON. As to whether another signal is imported?

Mr. KUHN. No; it does not.

Mr. PATTISON. In other words, the effect of having 11 baseball games going on in Boston, competing with the Red Sox game being played there is not something you are addressing yourself to here?

Mr. KUHN. No. As far as we are concerned, the matter should be left to the club which created the property rights.

Mr. PATTISON. So it would be to the interest of most clubs to have their signals imported if they were getting a copyright on it all over the country, wherever they were not playing?

Mr. KUHN. It might or might not be. It would just depend on what they thought was their particular interest.

Mr. PATTISON. Your primary interest is in protecting the area around the place where the ball game is played, so that you do not lose the home gate?

Mr. KUHN. And the home broadcasting rights—that is our primary interest.

Mr. PATTISON. Presumably, lots of times, you would not broadcast in Washington, D.C., when you have a game on here. For that particular game, you would broadcast that outside of Washington, D.C.?

Mr. KUHN. You mean, if I were a club in Washington?

Mr. PATTISON. Right.

Mr. KUHN. Normally, in baseball today, you would try to broadcast your away games on television and try not to broadcast your home games. As it is, of those we broadcast about two for every one are away, as against home.

Mr. PATTISON. The determination is made as to whether you can get a gate there?

Mr. KUHN. Your bigger cities, like New York and Chicago, seem to think they can get a gate, even though they do telecast the home game. Therefore, a great many home games are telecast in New York and Chicago.

Mr. PATTISON. It is not the normal competition of other teams playing in your home area that is bothering you? In other words, the fact that there is a lot of activity going on in Boston that takes away from people going to the Red Sox is not something that you are addressing yourself to here?

Mr. KUHN. If I understand your question: it is not. But what does worry me is this. If the Mets are having a very good year and the Red Sox are down, just taking an example, and a lot of Met's games are going to be carried by cable, the Red Sox are going to go farther down, because it is quite possible that the people will stay home and watch the Mets on cable, since this is where the action is at that particular time.

Cable will be selective about what they do carry. If the Mets are very attractive, they will bring them in. If they are not, they presumably will not, in cable's discretion, under the present arrangement. We think that could be very harmful, not only to the gate of the Red Sox, but to the broadcast rights of the Red Sox.

Mr. PATTISON. Under current law, the Boston cable, if there is something it can pick up in the air, if it has the right to import that particular signal from that particular station, which is a limited right, it could play the Mets, to the detriment of the Red Sox, just on the basis of a pure competition basis—people want to watch that rather than watch the Red Sox?

Mr. KUHN. Yes, it could do so today, under current law.

Mr. PATTISON. Do you object to that proceeding?

Mr. KUHN. Yes, I do. When I say it could do so today, under current law, I am talking about the current regulations of the FCC. And

indeed, under the proposed copyright law, it is permissible under both of those——

Mr. RAILSBACK. Would you yield?

Mr. PATTISON. Yes.

Mr. KUHN. I question whether it is permissible under common law if we want to press the notion of common law copyright. We have not pressed that to date because of the pending statutory administrative position.

Mr. RAILSBACK. Commissioner, I think you are probably right in the thrust of your argument, but I would think you could probably take some examples where cable systems started to import signals and as a result attendance figures actually declined. I would think you could obtain some examples. You certainly have up-to-date attendance figures.

Mr. KUHN. With my example in Boston, what you do find is confusing. You would have to do some market surveys. When the Red Sox are in first place, that is an upward thrust on the attendance; there is a downward thrust in the attendance by reason of cable. Where the effect is, you cannot automatically measure by looking at attendance.

Mr. RAILSBACK. It would be an analysis. I would think that what we are talking about here is substantial economic interests. So I would think it would be very helpful to have that kind of an analysis made. I do not have any idea how expensive it would be just to obtain examples.

Mr. PATTISON. To protect baseball's interest in its own product, the Red Sox's interest in its own product. But I am not particularly interested in protecting Red Sox interests against other competing products, whether they be baseball or anything else. I think that is where we differ.

Mr. KUHN. As far as anything else is concerned, we certainly do not differ, because we have no objection to cable carrying anything, so long as it isn't baseball. We have no prerogatives in that area. As far as we are concerned, we do not create those. So you can send—if cable wants to carry football against baseball or hockey, we have no objection to that whatsoever. We would be just as happy that it is not there, but with legitimate competition, there is nothing in the world we can say about that. It could be opera—I hope it is—but, where they carry the games of another baseball team that other baseball team does not want carried, then we think there is a real question, or without any say-so in any event, by the other baseball team. What will the Mets think about their games being carried in Boston? It seems to me the Mets ought to have control over that, because they create the property. I do not think the Red Sox should control it, because they did not create it. I think the position I am taking is a very logical one. We are only saying that whoever creates it should have the control.

Mr. PATTISON. I guess we are not only into communications policy but antitrust policy too, because it seems to me the only reason that the Mets would care or would make the decision that their games would not be played in Boston was because they would say to the Boston Red Sox, would have a conversation with them. The Red Sox would say, look, you are killing us over here; keep your stuff out of Boston, and we will keep our stuff out of New York.

Mr. KUHN. Let me address myself to that very important question, because I think it is very apt to crop up in people's minds that there is something sinister or evil about what I am saying. I suggest that there is nothing of the kind. If the Mets authorize their games to be carried in Boston over a period of time, you can be sure that Boston will turn around and try to sell its games into New York to compensate for the harm that has been done to it. The Mets, if they are smart, for the first reason I am going to give you, will not do that, because that kind of retaliation is not going to do them any good. They are trading off rights here for rights there. In other words, the Red Sox will come in and hurt them, and they will go in and hurt the Red Sox, and so in their own very selfish self-interests, the chances are very good that the Mets will not sell those games in Boston.

No. 2, the strength of any league sport is the fact that you try to have viable members. If what you do with your strong club is set about to impinge upon the operations of the weaker clubs, so that they destroy the revenues of the weaker clubs, you are going to have bankruptcy in the weaker clubs. That never serves the purpose of the stronger club. Antitrust purists may worry about this, but as a practical matter within a sports league, you have got a very different concept than you do within the brewing industry or steel industry, or something like that. United States Steel does not give a dead rat what happens to Jones, but the New York Mets care vitally what happens to another baseball club. They do not want to put it out of business. It ruins the league. There is no league when you do that.

Mr. KASTENMEIER. To follow up on that—I would have thought from the thrust of your statement, that the only reason for control over those long-distance signals would be to prevent them in fact from penetrating the markets of weak teams, and thereby, what seems to have been complained about—other than the lack of control, in your statement. You indicate, however, that that would not necessarily be the case. They would be under the control of the home team.

In the case of the National Football League, for network purposes, TV pooling among the teams—which, if you have that in organized baseball, would mitigate that sort of damage, if in fact they share in both cable and regular television. Or indeed, I suppose you could have league rules concerning the importation of distant signals on cable, but you contemplate neither of these?

Mr. KUHN. Of course, we do have a pooling of broadcasting rights, under the National Television Activities 1961 Sports Broadcast Act. Those are pooled and shared equally. In the case of some of our weaker cities, that is more important revenue to them than the local revenue in fact is.

As far as cable is concerned, we certainly have not projected any arrangement for what might be done with revenues there, because our argument here is that there should be a different approach from that contemplated by the bill. I really have not contemplated that. I am not certain what kind of antitrust problems we might run into there, Mr. Chairman, if we got into pooling those revenues without the benefit of a sports broadcast act.

Mr. DANIELSON. May I have another question, Mr. Chairman?

Mr. KASTENMEIER. Yes.

Mr. DANIELSON. I too was confused—misunderstood, in I think the same manner as Mr. Badillo, Mr. Pattison, and the chairman. I under-

stood from your first point of your suggested amendments on pages 15 and 16, that you meant that the team which was resident in the proposed viewing area would be the consenting party to the television. Am I wrong in that?

Mr. KUHN. Yes. As I read the language, it is ambiguous, so I am not surprised you misunderstood it.

Mr. DANIELSON. What I am basing it on is that your sentence on the top of page 16, this area that is talking about the 75-mile zone around the city, this area surrounding major league cities is important to professional sports. A 75-mile zone defines at the very minimum, the drawing area for home games. It goes down a little farther—it is self-evident that no competing telecaster in the market has a compulsory license to bring in competing games. They should not have that power. From that I infer you are concerned about protecting the 75-mile zone around the major league city where the signal is being imported.

Mr. KUHN. I am concerned about protecting Boston, if the Mets' signal is being brought into Boston. But the control over that should be the control of the Mets, in my judgment, who have created the baseball event.

Mr. DANIELSON. I heard what you said. I understood all of the words, but the impression that is left seems to be unchanged.

Thank you very much.

Mr. KASTENMEIER. Thank you, Commissioner Kuhn.

Mr. KUHN. Thank you very much. I hope I have not confused you, and I hope I have added a little more light than darkness to this. Thank you very much.

Mr. KASTENMEIER. Next, representing the National Hockey League, we are pleased to greet Mr. Philip Hochberg, who will present the statement on behalf of Don V. Ruck, who is vice president of the National Hockey League.

TESTIMONY OF PHILIP R. HOCHBERG, ON BEHALF OF DON V. RUCK, VICE PRESIDENT, NATIONAL HOCKEY LEAGUE

Mr. HOCHBERG. I apologize for Mr. Ruck's absence. He was tied up in New York today at some important meetings. I hope my contribution will not be brevity alone.

I think hockey, Mr. Chairman and members of the committee, subscribes to the views expressed by Commissioner Kuhn. Indeed, what has been and probably will be referred to as the baseball compromise, I am pleased to say originated in a letter from the National Hockey League to Senator Hugh Scott last August, so obviously we also concur in that.

I would like to, with the Chair's permission, address myself to the end of the prepared remarks to some of the questions specifically raised by Mr. Danielson and Mr. Railsback, Mr. Pattison, and by you, Mr. Chairman.

Mr. KASTENMEIER. Mr. Hochberg, because there is a vote which the committee must attend ongoing in the House at this moment, before you really get started I am disposed to recess the hearing until 4:10.

[A brief recess was taken.]

Mr. KASTENMEIER. The subcommittee will come to order for the purpose of continuing the hearing, beginning with Mr. Philip Hochberg.

Mr. HOCHBERG. Thank you again, Mr. Chairman. I have attempted in the interest of time to cut out some of the material from my prepared statement. I might add, though, parenthetically, for 6 years I did the public address announcing at D.C. stadium for our old baseball team. It looks like we just had a rain delay in the ninth with the Senators losing. We have lost a good deal of the crowd.

Mr. Chairman, the National Hockey League urges the subcommittee to stop for a moment in its consideration of a highly technical and detailed piece of legislation, to consider the unusual problem of professional sports. The legislation before you places us in a position of competing with ourselves, wherein an entity—cable television—never having bargained with property right holders in the marketplace, can go out, "cherrypick" sporting events to best suit its own needs, and then bring in those events without regard to the consequences of that action. This potentially threatens the very foundation of professional sports.

Professional sports is unlike any other entertainment medium. What Judge Grim said in the famous 1953 decision, in *United States* v. *National Football League*, about football, is still true of all of professional sports. He said:

> Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker teams into financial failure. If this should happen, not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.

And if you are talking about the viability of teams in a league, you are talking, bottom line, about two sources of income: the home gate and the value of the television package both local and network sales. The impact of what you are considering today threatens the continued viability of both of these sources.

We would suggest to you that protection of the creators of these products indeed must be fashioned differently than the protection for the creators of most entertainment. Control, not payment, is the crucial aspect for professional sports. Contrast for a moment the two following situations dealing with a hypothetical Washington, D.C., cable television system which imports the distant signal of a Philadelphia television station: This station carries, among other programing, the syndicated series of "Bonanza" and the television package of the Philadelphia Flyers hockey team. There is no doubt that the importation of the "Bonanza" series into Washington will undermine the potential sale of that program to a Washington television station. Therefore, under this proposed legislation and under the regulations of the Federal Communications Commission, the property right holder in "Bonanza" will either receive ultimately some dollar compensation or his potential sale in Washington will be protected.

The Philadelphia Flyers, however, have chosen not to attempt to sell their games in Washington. There is the implicit recognition that there may not be enough of a television market for it, but above and beyond that, the viability of the Washington Capitals hockey team will be affected if a Flyer television sale is made here.

Enter suddenly, this Washington cable television system. It has no concern for the viability of the Capitals franchise; it merely wants to get paying subscribers on line. Importing the games of the Flyers, and the Rangers and the Bruins, will devastate the Caps' ability to bring people in the gate. Who, for instance, is going to pay to watch the Caps play the Flyers at the Capital Center when that very game is being imported right back from Philadelphia? Who is going to pay to see the Caps and the Kansas City Scouts play, when on the cable the distant signal of the Flyers and Buffalo Sabres is being imported?

But the home gate is not the only area of injury. The Caps have a television package with Channel 9 for the telecast of a number of away games. WTOP–TV and the advertisers with whom it deals have purchased hockey exclusively in the Washington market. Suddenly, they no longer have it. What will happen to the television package of the Capitals when it is subjected to a constant barrage of Flyers, Rangers, and Bruins games? We respectfully urge this subcommittee to reinstitute the type of controlled protection which was a part of those bills originally introduced in the 93d Congress.

I would like to move into two other areas of concern to the National Hockey League on a more detailed level in dealing with the bill.

We urge Congress to retain the provisions of section 101 which allows a work to be fixed if a fixation is being made simultaneously with the transmission of the event. This imposes a burden on the property right holder to make certain there is both a transmission and a fixation. Absent either of the prerequisites, copyright does not attach to the product. We understand our burdens, and we are willing to live with them.

On a more substantive question, however, we urge that the fee schedule embodied in section 111 be returned to its original form and there be periodic review powers vested. Furthermore, we urge statutory, or report, language recognizing the peculiar problems of professional sports vis-a-vis the compulsory license. For instance, the Royalty Tribunal is empowered under the legislation to change the royalty rate on the revenue basis on which the royalty fee payment by CATV shall be assessed. We sincerely feel that live sports gates and telecasting revenues will be more seriously impaired than other copyrighted efforts. Moreover, this will become a further issue in dealing with distribution of any compulsory licensing fees. Both the Royalty Tribunal and the Copyright Office must be statutorily aware of the unique problems of the organized professional team sports industry as a major component of communications.

Furthermore, section 111(d)(3)(A) allows some agreement among the copyright claimants. This language is identical to that of section 116(c)(1) and appears to have had obviously in mind music licensing organizations.

Nevertheless, given the highly unusual nature of sports entities, we urge language specifically allowing organized professional team sports to develop policies relating to the acquisition of all of these fees, their collection, and distribution. For instance, if in my Washington hypothetical, there was intense cable saturation in this market, the National Hockey League, in its own wisdom, might choose to funnel fees gathered throughout the league here to offset this very specific negative impact. Obviously, moreover, it could also be used to aid minor league teams suffering as a result of cable importation. In any case, broad, or

broader, statutory language allowing for the implementation of policies dealing with the entire cable question is appropriate.

I appreciate this opportunity to address you this afternoon on questions which are of considerable significance to organized professional team sports.

[The prepared statement of Don V. Ruck follows:]

STATEMENT OF DON V. RUCK, VICE PRESIDENT, NATIONAL HOCKEY LEAGUE

Thank you for the opportunity of appearing here this morning. My name is Don V. Ruck, and I am vice president of the National Hockey League and president of its marketing and television subsidiary, National Hockey League Services, Inc.

The NHL urges this subcommittee to stop, for a moment, in its consideration of a highly technical and detailed piece of legislation to consider the unusual problem of professional sports. The legislation before you places us in a position of competing with ourselves, wherein an entity—cable television—never having bargained with property right holders in the marketplace can go out, "cherry-pick" sporting events to best suit its own needs, and then bring in those events without regard to the consequences of that action. This potentially threatens the very foundation of professional sports.

Professional sports is unlike any other entertainment medium. What Judge Grim said in the famous 1953 decision in *United States* v. *National Football League* (116 F. Supp. 319 (E.D. Pa. 1953)) about football is still true of all of professional sports:

"Like other professional sports which are organized on a league basis, it has problems which no other business has. The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitiors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.

"Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker teams into financial failure. If this should happen, not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably." Id at 323.

And if you are talking about the viability of teams in a league, you are talking, bottom-line, about two sources of income: the home gate and the value of the television package (both local and network). The impact of what you are considering today threatens the continued viability of both of these sources.

I think it is a given, therefore, that organized professional team sports are different than other entertainment entities. We would suggest to you that protection of the creators of these products indeed must be fashioned differently than the protection of the creators of most entertainment. Contrast for the moment the two following situations dealing with a hypothetical Washington, D.C. cable television system which imports the distant signal of a Philadelphia television station.

This station carries, among other programming, the syndicated series of "Bonanza" and the television package of the Philadelphia Flyers hockey team, Stanley Cup Champions of the last two years. There is no doubt that the importation of the Bonanza series into Washington will undermine the potential sale of that program to a Washington television station. Therefore, under this proposed legislation and under the regulations of the Federal Communications Commission, the property right holder in Bonanza will either receive (ultimately) dollar compensation or his potential sale in Washington will be protected.

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What will happen to the television package of the Capitals when it is subjected to a constant barrage of Flyers, Rangers and Bruins games? We respectfully urge this subcommittee to reinstitute the type of protection which was a part of those bills originally introduced in the 93d Congress.

I would like to move into two other areas of concern to professional sports on a more detailed level in dealing with the bill.

We urge Congress to retain the provisions of § 101 which allows a work to be "fixed" if a fixation is being made simultaneously with the transmission of the event. This imposes a burden on the property rightholder to make certain there is both a transmission and a fixation. Absent either of the prerequisites, copyright does not attach to the product. We understand our burdens and we are willing to live with them.

On a more substantive question, however, we urge that the fee schedule embodied in § 111 be returned to its original form and that there be periodic review powers vested. Furthermore, we urge statutory (or report) language recognizing the peculiar problems of professional sports vis-a-vis the compulsory license. For instance, the Royalty Tribunal is empowered under the legislation to change the royalty rate on the revenue basis on which the royalty fee shall be assessed. We sincerely feel that live sports gates and telecasting revenues will be more seriously impaired than other copyrighted efforts. Moreover, this will become a further issue in dealing with distribution of any compulsory licensing fees. Both the Royalty Tribunal and the copyright office must be statutorily aware of the unique problems of the organized professional team sports industry as a major component of communications.

Furthermore, § 111(d)(3)(A) says: "* * * Notwithstanding any provisions of the antitrust laws * * *, for purposes of this clause, any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf."

(The language is identical to that of § 116(c)(1) and appears to have had obviously in mind, music licensing organizations.) Nevertheless, given the highly unusual nature of sports entities, we urge language specifically allowing organized professional team sports to develop policies relating to the acquisition of all of these fees, their collection, and distribution. For instance, if in my Washington hypothetical, there was intense cable saturation in this market, the National Hockey League, in its own wisdom, might choose to funnel fees gathered throughout the league here to offset this very specific negative impact. Obviously, moreover, it could also be used to aid minor league teams suffering as a result of cable importation. In any case, broad statutory language allowing for the implementation of policies dealing with the entire cable question is appropriate.

I appreciate the opportunity to address you this morning on questions which are of considerable significance to organized professional team sports.

Mr. HOCHBERG. If I may, sir, I would like to address some of the questions that have been addressed to Commissioner Kuhn by the members of this subcommittee.

Mr. KASTENMEIER. You may do so, but in view of the hour please be concise.

Mr. HOCHBERG. Yes, sir, Mr. Danielson has raised the point to Commissioner Kuhn as to whether there was ever any protection indicated for professional sports in a copyright sense by the Supreme

Court. I would suggest to Mr. Danielson that there is language in the *Teleprompter* case which talks about protection. It distinguishes, sir, the normal television entertainment distribution pattern and talks about protection for live audiences, or protection for payments from live audiences.

I would be very happy to submit a letter to the committee on that regard.

On a number of other questions raised by Mr. Danielson, indeed, live telecast of professional sporting events are not copyrightable in the view of this counsel. Nevertheless, the U.S. District Court in the Western District of Pennsylvania in 1938 recognized the concept of unfair competition where there was a radio pickup of a live broadcast of a game in the *Pittsburgh Athletic Club* case.

Finally, I think that perhaps on that one matter, sir, it is noteworthy that we could probably resolve all of Mr. Danielson's threshold copyright questions by merely delaying the telecast of a game for a minute or so. It would no longer, the telecast would no longer be contemporaneous with the play of the game but it would satisfy any threshold copyright questions.

Mr. KASTENMEIER. Thank you.

Incidentally, let me compliment you for a very concise, clear statement.

Mr. Danielson.

Mr. DANIELSON. I will be equally brief. Thank you for your comments. You have at least faced the issue directly. The fixation and then let's say 1- or 5- or 10-minute delay in transmission, I seriously doubt would suffice. However, you have, I believe, correctly faced the issue here. You talked about your concern on page 1 competing with yourself. The quotation from that 1953 definition on more than one place refers to competition.

On page 3 you mention Philadelphia Flyers. In effect, that they do not want to be competing with the Washington Capitals in the hockey game, for example.

On page 4 you talk about your need for protection. You are talking about protection from competition which erodes your market.

I think you have a complaint. I think you have a problem. My only difference, probably, with you is that this may be the wrong forum. I think probably the Federal Communications Commission or some law regulating interstate commerce could provide that you cannot transmit these signals in a competitive manner. But I do not think that copyright is the correct forum here. That is my only point.

I think you have got a problem. I think you just went to the wrong doctor.

Thank you very much.

Mr. KASTENMEIER. Any questions, Mr. Badillo?

Mr. BADILLO. No questions.

Mr. KASTENMEIER. Mr. Pattison?

Mr. PATTISON. No questions.

Mr. KASTENMEIER. There is a vote and we will have to again recess for that. If you propose to give us a further statement, either in terms of the *Teleprompter* case or anything else which expands on your comments that you made, we would be pleased to have them.

Mr. HOCHBERG. Thank you, sir.
[The letter referred to follows:]

O'CONNOR AND HANNAN,
Washington, D.C., March 26, 1976.

Hon. ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Rayburn House Office Building, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: In a colloquy with Representative Danielson on June 12, 1975, while testifying on H.R. 2223, I made the following statement:

Mr. Danielson has raised the point . . . as to whether there was ever any protection indicated for professional sports in a copyright sense by the Supreme Court. I would suggest to Mr. Danielson that there is language in the Teleprompter case which talks about protection. It distinguishes, sir, the normal television entertainment distribution pattern and talks about protection for live audiences, or protection for payments from live audiences. I would be very happy to submit a letter to the Committee in that regard. Transcript at 210. You invited a written statement to amplify on that remark. Transcript at 212.

In the case of *TelePrompter Corp.* v. *Columbia Broadcasting System, Inc.* 415 U.S. 394, 94 S. Ct. 1129 (1974), the Supreme Court in part refused to accept the argument of the copyright holder that liability should attach because of the deleterious impact of . . . [cable television] retransmission upon the economics and market structure of copyright licensing. Id. at 410, 94 S. Ct. at 1139. The Court said that cable television systems merely extend the viewability of a broadcast program and cause no interference with the copyright holders' "means of extracting recompense for their creativity or labor." Id. at 412, 94 S. Ct. at 1140. However, the Court distinguished "ordinary" television programers from those who receive direct compensation, such as propagators of other copyrighted material, such as those who sell books, *perform live dramatic productions, or project motion pictures to live audiences. . . .* (Emphasis added.) Id. at 411, 94 S. Ct. at 1139.

Given this language, therefore, consider the following situation: A live performance from the Kennedy Center in Washington is telecast by a Philadelphia television station but is not televised in the Washington area. However, a Washington area cable system imports the distant Philadelphia signal, thereby doing away with a considerable part of the incentive of patrons to attend the live performance. Or, a movie distributor sells the right to telecast a movie in Philadelphia, while it is still being shown in Washington-area theaters. A Washington-area cable system imports the distant Philadelphia signal, thereby destroying the incentive of patrons to attend the theater showing of the motion picture. In both of these cases—where the copyright holder still depends on live audience compensation—an importation of the distant signal negatively affects his property rights in a manner recognized by the *TelePrompter* doctrine.

So too with a sporting event. When the Washington Capitals entertain the Philadelphia Flyers at the Capital Centre and the game is televised in Philadelphia (but not in Washington), an importation of that distant Philadelphia television signal affects the ability of the Washington team to draw at the gate. In a very similar fashion, the importation of a telecast between two excellent teams when the Capitals are playing a poor drawing team or even when they are not playing at all affects the ability of the Capitals to attract live patrons through the gates—far and away the most significant source of sports revenue. Sports has long made the argument that a league can only be as strong as its weakest member; for weak teams to suffer importation of their own games and outstanding telecasts of other teams in the very same league will merely be the first step in eroding the financial base of the various teams in the league.

I appreciate the opportunity to submit this letter for the record.

With kindest regards, I am,

Sincerely,

PHILIP R. HOCHBERG.

Mr. KASTENMEIER. Is Captain Coppedge in the audience?

Mr. COPPEDGE. Yes, sir.

Mr. KASTENMEIER. Do you still want to bear with us, Captain?

Mr. COPPEDGE. I think it is in our interest.

Mr. KASTENMEIER. We will recess and return in 10 minutes to conclude the hearings today.

[A brief recess was taken.]

Mr. KASTENMEIER. The committee will come to order.

At this moment, I would like to welcome the last witness on today's schedule, Capt. John O. Coppedge, who is chairman of the National Collegiate Athletic Association Cable Television Subcommittee.

Captain Coppedge?

[The prepared statement of Mr. Coppedge follows:]

STATEMENT OF JOHN O. COPPEDGE, CHAIRMAN, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, CABLE TELEVISION SUBCOMMITTEE

The National Collegiate Athletic Association and its more than 800 members and affiliated organizations believe that the provisions of the Copyright Revision Bill (H.R. 2223) granting cable television a compulsory license to make secondary transmissions of television broadcasts must be amended to protect college athletic programs from serious injury as a result of widespread, uncontrolled secondary transmissions of sports events.

Cable system carriage of certain telecasts of collegiate and professional sports events into communities located far from the transmitting site endangers in-person attendance at college games essential to the economic viability of these programs. By presenting on local television events which would not be authorized for television broadcasting in the area concerned because of the injury which would be inflicted on local schools and colleges, it threatens both protection from professional football telecasts extended by Federal law, and protection from intercollegiate event telecasts which is a major element of NCAA telecasting policies. Such cable carriage also increasingly inhibits the access of collegiate sports events to broadcast television, and thus the extent to which they are available to the television-viewing public.

It is the NCAA's position that the compulsory license provisions of Section 111 of the bill must be amended by provisions which would:

1. Provide high schools and colleges with protection against cable retransmissions of television broadcasts of professional football games into areas where such broadcasts themselves would be precluded by the limitations imposed by Congress in Section 3 of Public Law 87–331; and

2. Limit cable retransmissions of television broadcasts of intercollegiate sports events into areas where the broadcasting of the event concerned is not authorized. In the event that this Subcommittee concludes that the Federal Communications Commission is the proper agency to develop detailed regulation of cable television operations in these regards, we submit that Congress must include in H.R. 2223 provisions which give the Commission specific direction and authorization to develop such rules which take into account all relevant interests.

INTRODUCTION AND BACKGROUND

The member organizations of the NCAA are firmly committed to the philosophy expressed in Article II of the NCAA's Constitution that "competitive athletic programs of the colleges are designed to be a vital part of the educational system." To this end, these organizations provide competitive programs in at least 36 different sports for more than 210,000 men and women. The NCAA estimates that if the programs of non-member institutions are taken into account, approximately $269,048,000 are spent annually by this nation's colleges and universities to provide some 300,000 students with the educational benefits of amateur sports.

While the NCAA has several concerns in common with the professional sports leagues, including the concern regarding the impact of cable carriage of broadcasts of sports events, it is important to bear in mind that the financial situation and needs of intercollegiate athletic programs differ from those of professional sports leagues and teams in fundamental ways. In football, for example, the National Football League fields 26 teams each of which is based in a major metropolitan area, for a possible total of 13 games on a given Sunday-Monday period. The NCAA currently has some 800 member institutions, the bulk of which are located in smaller towns and rural areas, and which on a given Saturday are likely to field several hundred teams. Thus, in the case of collegiate events there are

many more games which could potentially be harmed, and many of these games are played in relatively rural areas where a high proportion of the local population must attend if the game is to be successful.

Moreover, the loss of even a few dollars in gate receipts or television revenues resulting from cable retransmissions may have a major impact on the viability of a college athletic program. The financial crisis in higher education is well documented, and the situation of athletics is particularly perilous. The NCAA has estimated that as few as 10 percent of intercollegiate sports programs are fully self-supporting. Financial pressures have led a number of universities to eliminate or seriously curtail their intercollegiate sports programs.

Financial concerns have also led to recommendations that substantial cutbacks in college athletics be made on a nationwide basis, and in particular that reductions in the number and amount of athletic scholarships be made. This last suggestion, while offering a relatively simple means of achieving a substantial savings, would have a drastic effect on programs which have been an important factor in offering the opportunity of a college education and personal advancement to underprivileged students.

The essential fact that we wish to call to the Committee's attention is that what is at issue when the implications of cable carriage of sports events broadcasts are discussed in the context of intercollegiate athletic programs is not the mere profits of a business enterprise, but rather educational programs which are particularly sensitive to economic pressures.

THE CURRENT SITUATION

A. Cable system retransmission of intercollegiate sports events

Since the 1950's the NCAA has administered a series of football telecasting plans, designed to promote the telecasting of intercollegiate sports for the benefit of the viewing public, and to spread the availability of television coverage and the resultant revenues as widely as possible among the participating schools. These plans provide for no "blackout" of games appearing on the national series, but they do include provisions designed to measure the impact of telecasting on concurrently conducted college games.

The result is a program which serves the interests of the colleges and the viewing public by encouraging the telecasting of the maximum number of intercollegiate games with a maximum number of schools participating. By providing protection for other colleges and universities against the undue hardships which might otherwise result from such telecasting, this plan further serves the public interest by insuring the continuing vitality of a large number of sports programs providing opportunities both for participation by this country's youth, and for future viewing—either in person or on television.

An important element of flexibility is injected into these arrangements by provisions authorizing "exception telecasts." These rules permit limited telecasting of events of local interest, such as sold-out home games or games played far from an institution's campus, but which are not selected by the network for telecasting on the national series. Such telecasts are made, however, only where they will have no substantial adverse impact on in-person attendance at contemporaneous, non-telecast college games. Of the 174 appearances on television made by NCAA teams in 1974, 74 were the result of exception telecasts.

It is clear that without appropriate limitations on cable retransmissions of geographically distant television broadcasts of college events, the assumptions on which the NCAA telecasting plans are based will be vitiated, and these arrangements which have served colleges and the television-viewing public so well will be destroyed. Cable carriage of regional network telecasts of NCAA events across regional boundaries will make it impossible for colleges to schedule their games so as to avoid the impact of the multiple events appearing in local television. Eventually, it will destroy the regional system. Widespread cable carriage will magnify the impact of "exception telecasts" on contemporaneous games, and has already severely curtailed the ability of NCAA institutions to make such telecasts. The inescapable result of such cable retransmissions will be that fewer NCAA institutions will have meaningful access to broadcast television, there will be less college sports available on over-the-air television, and many college programs will suffer economically.

B. Cable system retransmissions of professional football telecasts

Cable retransmissions also endanger the protection from *professional* football telecasts which Congress extended to colleges and high schools in the 1961 Telecasting of Professional Sports Contests Act (P.L. 87–331). This measure

provides professional sports leagues a limited exemption from the antitrust laws so as to permit them to negotiate league-wide television contracts. In express recognition of the public interest in maintaining viable school-college athletic programs, however, it precludes television broadcasts of professional football games on Friday evenings or on Saturdays in conflict with scheduled local high school or college games. It is clear that under this provision the professional football clubs may make Friday evening or Saturday telecasts which do not conflict with local school or college games in the area of the broadcast, and such telecasts are in fact made. At the time this provision was enacted, cable carriage was principally confined to local broadcast signals, and accordingly was not a major concern.

Recent and projected growth in the number and capacity of cable systems, and a regulatory climate in which the importation of distant broadcast signals by cable systems has steadily grown, now endanger the protection extended by Public Law 87–331. In the absence of appropriate limitations, cable systems will import broadcasts of programs made in localities without conflicting school or college games into communities where such games are taking place, with disastrous effect on the gate at the high school and college games.

PROPOSED REMEDIAL MEASURES

The NCAA urges that special limitations designed to protect high school and college sports programs from potential injury due to cable carriage of professional and amateur sports event broadcasts be imposed on the authority which this bill would grant to cable television systems to make secondary transmissions of television broadcasts.

Protection against professional sports encroachment could be provided by prohibiting retransmission of a professional football game by a cable system located in an area in which the broadcasting of the pro game would be forbidden by Section 3 of P.L. 87–331. A second amendment which would exclude from the compulsory license any simultaneous retransmission of an intercollegiate event into an area in which that event is not available to broadcasters would provide protection against potentially harmful carriage of intercollegiate events. In connection with the later provision, it would be understood that the term "available" should be used in a hypothetical sense, and that the fact that a local broadcaster had decided not to transmit an event which was otherwise available to him would not preclude cable system carriage in the community concerned.

Such amendments would simply assure that cable systems are subject to the same limitations as television broadcasters in the carriage of sports event broadcasts. It would be important, of course, to insure that the full scope of injunctive remedies are available to prevent the irreparable injury that violations of these provisions could cause.

We recognize that the Federal Communications Commission has initiated a rulemaking proceeding (FCC Docket No. 19417) dealing with cable carriage of sports event telecasts. We believe that in this proceeding the FCC has ample authority to deal completely with the issues concerned and that it could promulgate rules which would accord colleges the protection required. However, the Commission itself has raised questions as to the extent of its authority, and whether in regulating cable it can take account of the impact of cable carriage on interests such as those of the NCAA's members. In the circumstances, it can confidently be predicted that any rules which the Commission may ultimately issue will be subjected to time-consuming court challenges before they become effective.

Moreover, widely circulated reports suggest that in the absence of clear policy direction from Congress, the Commission is likely, if it issues any rule at all, to adopt a regulation limited to forbidding the retransmission of an event by a cable system into the area where that event is being played. Even assuming that it applied to amateur as well as professional sports, such a "blackout" protection is not responsive to the concerns of the colleges and would not accord the necessary protection.

The NCAA submits that the issues of cable carriage of sports events are a matter of substantial public interest on which Congress must make its will known. The adoption of specific protection in the Copyright Revision Bill is clearly the most direct and appropriate means to accomplish this result.

Should Congress decide, however, that the FCC is the appropriate forum to develop detailed regulations dealing with these issues, then it is critical that

H.R. 2223 incorporate specific language calling upon the Commission to take action to protect intercollegiate sports and granting it specific authority in this area.

CONCLUSION

Intercollegiate athletics stands now at a critical point in its history. The financial difficulties of educational institutions are having a particularly heavy impact on sports programs. New governmental policies are being promulgated, the implementation of which will impose substantial burdens on collegiate sports programs. The goal of the NCAA is simply to attempt to assure that these programs are not further ravaged by cable systems acting in the name of increased profits and illusory viewer benefits. It is the NCAA's belief that this can be accomplished in a balanced manner without undue prejudice to the interests of any individual group.

TESTIMONY OF JOHN O. COPPEDGE, CHAIRMAN, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, CABLE TELEVISION ASSOCIATION SUBCOMMITTEE, ACCOMPANIED BY RITCHIE THOMAS, COUNSEL, NCAA

Mr. COPPEDGE. Thank you, very much.

Mr. KASTENMEIER. You have been very patient to wait until this hour to present your statement.

Mr. COPPEDGE. Thank you, Mr. Chairman, and members of the subcommittee. My name is John Coppedge. I am director of athletics at the U.S. Naval Academy.

I am here today, however, as the chairman of the cable television subcommittee of the National Collegiate Athletic Association. My purpose is to express the view of the NCAA member colleges and universities, that the compulsory license to make secondary transmissions of television broadcasts, which the copyright revision bill would grant to cable television systems, must include limitations protecting college athletic programs from damage from cable carriage of certain sports events broadcasts.

In view of the limited time available this afternoon, I will confine my remarks to a brief outline of the nature and basis for our concern. I request, however, that the NCAA's full prepared statement be incorporated in the record of this hearing.

Mr. KASTENMEIER. Without objection, the statement will be received, in full.

Mr. COPPEDGE. Cable system retransmissions of certain telecasts of collegiate and professional sports events into communities located far from the transmitting site endangers in-person attendance at college games essential to the economic viability of intercollegiate athletic programs.

By presenting on local television events which would not be authorized for television broadcasting in the area concerned, because of the injury which would be inflicted on local high school and colleges, it threatens both protection from professional football telecasts extended by Federal law, and protection from intercollegiate event telecasts which is a major element of NCAA telecasting policies.

Cable carriage of professional football telecasts made on Friday nights or on Saturdays during the high school or college football season, threatens to erode protection from such telecasts which Congress extended to high schools and colleges in section 3 of Public Law 87-331, with potential serious impact on high school and college gate receipts.

Cable retransmissions of NCAA football telecasts into areas where a different regional game is being broadcast threatens to destroy the NCAA's regional system of telecasts, a critical element in the NCAA's telecasting policy, which permits a broad range of NCAA institutions to gain television exposure and related revenues.

In the 1974 football season, 110 NCAA colleges and universities realized a total of more than $8 million in revenues from regional telecasts. In recent years, widespread cable carriage has also increasingly prevented NCAA members from taking advantage of NCAA television plan provision permitting individual institutions to make limited local telecasts of football games—such as sold out home games or games played a substantial distance from the institution's campus—which were not selected by the network for appearance on the national series.

Thirty-seven NCAA institutions appeared on such "exception" telecasts last year. Institutions already precluded by cable carriage from making exception telecasts include Ohio State and the University of Arizona, while telecasts by Arkansas and the University of Michigan are on the endangered list. Accordingly, unless this bill incorporates appropriate specific limitations on secondary transmissions of intercollegiate sports event telecasts, or at a minimum expressed directions to the Federal Communications Commission to issue rules on this regard, the access of collegiate sports events to broadcast television—and thus, the extent to which they are available to the television viewing public—will be gravely curtailed, and many colleges which now share in television exposure and revenues only because of the regional and exception telecasting agreements, will suffer.

We are asking only that cable systems be subjected to the same limitations as apply to television broadcasts of the sports events concerned. We believe that our request is reasonable and that it is in the public interest to protect high school and college athletic programs.

We urge the adoption of provisions in section 111 which respond to our concern.

Mr. KASTENMEIER. Thank you.

Do I understand that, in terms of your chairing this cable television subcommittee of the NCAA, do you represent the views of the colleges and high schools? Do you represent the high schools' point of view, too?

Mr. COPPEDGE. I represent the high schools' point of view only to the extent that they suffer the same problems that we do. And as we have been—the professional rules covered both, so that is the reason for my language in the statement.

Mr. KASTENMEIER. Whatever it is—and perhaps it is not precisely clear what we have heard, that organized professional baseball and professional hockey seeks, in terms of control over their cable transmissions, as well as normal broadcasts, do you seek a similar remedy in the bill?

Mr. COPPEDGE. I do not think so, exactly. Our concern is if a game is televised, we would like the same restrictive provisions for cable television that are provided the regular broadcasting people.

We are not trying to black it out. We are just trying to make sure that the colleges and schools in a particular area have some time during the day in which they can play, that they will not have to be faced with television.

In a regional game, we would welcome all cable systems to carry it in that region. In a national game, we would welcome all cables to carry it nationally.

But the problem comes when you have a regional game which is very vital to the NCAA schools. They are set at a certain time period. If there is another regional game on the west coast, for instance, which would be brought back to another region, there would be nowhere where the remainder of the schools or universities could play during that day in which they would not be in competition with some type of television.

I do not think that the royalty problem, as we have heard this morning, is one that we are discussing. The exception telecast, which is vital and important to many schools and universities and one which the NCAA Television Committee would like to endorse, is backfiring and forcing schools such as Ohio State not to provide cable telecast when they have sold-out games. It would be very good if they could provide local broadcasting, which we support in Columbus, but to take that signal and import it into other parts of the State of Ohio does damage to colleges and universities.

Mr. KASTENMEIER. Your statement seems to recognize, as the gentleman from California, Mr. Danielson, has suggested, the best place to resolve this question would, perhaps, be in the FCC rather than in the context of this bill—the copyright bill. Is that not true?

Mr. COPPEDGE. I do not believe we believe that, sir. There has been a problem. Our experience has been that the FCC has some doubt about their authority in this area. Any regulations the FCC issues would be subjected to court cases which would be lengthy.

I think this is such a big, public interest thing that if you do not provide specific language in the bill, then certainly some direction should be given by your committee. We are talking about a lot of schools—800 or so, or more, colleges and universities throughout the country.

It has a lot of public interest. And to date, there has been some hesitancy on the part of the FCC to put out ground rules on this subject, and I think there is some doubt about their jurisdiction.

We clearly think it is your committee who should—and that the bill should specify as a minimum, direction in which the FCC should go, if not some specific language that would limit these broadcasts.

Mr. KASTENMEIER. For purposes of historical comparison, the NFL blackout would not be affected by cable, would it? They could not invade the existing blackout, because there would be no transmission?

Mr. COPPEDGE. It is certainly a possibility of them scheduling, without damage, on a Friday night, or Saturday, and be perfectly appropriate to broadcast live in a particular area in accordance with the law.

But if that same game was transmitted into some other area, which it is likely to do, damage would occur. The illustration that I hear bantered about quite a bit among my colleagues is a signal that came out of an Atlanta game and was imported into Arkansas on a Friday night when the high schools were playing. I cannot pinpoint an illustration where one of the colleges were particularly affected, but it certainly has the potential.

If you keep up with it, as you noticed, in New York this year, because of scheduling problems in Shea Stadium, the Giants are, in fact, going to play some Saturday games during the regular season.

If these signals were imported to distant areas, it would do appreciable damage.

Mr. KASTENMEIER. Is not cable subject to the same limitations that other television broadcasting is, in that connection?

Mr. COPPEDGE. No, sir.

Mr. KASTENMEIER. What advice would you have for us, in connection with cable telecasting of signals involving either college, high school, or professional games which interfere with colleges?

Mr. COPPEDGE. I think the specific language we would be interested in is providing the same limitations to them that are provided on over-the-air or regular telecasts. Those are clearly defined and workable.

Mr. KASTENMEIER. You would not grandfather anything, but take recognition of the fact that perhaps some cable systems have been televising with this sort of program sports events for years and all of a sudden they would have to get a prior clearance, I take it, from perhaps the NCAA or some other organization?

Mr. COPPEDGE. I do not think so. I will check with our attorney before I answer—he is more familiar with that than I am. But I do not think so—there have not been a number of abuses, to date. However, the potential for abuses are tremendous, and there have been abuses—that is, Ohio State is a good example. The University of Arizona had a problem where there was a junior college championship game and about a week before the game, it was advertised in the paper that cable television was going to carry the Arizona versus Arizona State game. This forced the junior colleges to shift the schedule of the championship game to a night game, so they would not have to compete with the cable telecast—which was most detrimental to their game.

Although I have pointed out some specific illustrations, there have not been too many, but the potential damage especially in the regional games, which is of greatest concern to us, and to importing a signal in to various regions, is considerable.

Mr. THOMAS. My name is Ritchie Thomas. I am Washington counsel for the NCAA. To amplify that answer a little bit, sir, Captain Coppedge is correct that, as you know, with the new FCC rules still only 3 years old, the distant signal importation as to the systems which are now coming into being, is still in its infancy.

So, as to the problem of the spread of regional games, across regional boundaries, it has not as yet become a significant problem. So I do not think there is any problem, really, by grandfathering such a carriage because it really does not exist, substantially.

As to exception telecasts, basically the problem is that if widespread cable carriage so spreads the impact of broadcasting on other colleges and universities, that contemporaneous games are injured, we cannot make the exception telecast.

So, grandfathering in this regard would simply mean that the exception telecasts cannot be made.

Again, our position as to national telecasts and regional telecasts, as far as cable systems in the region are concerned, is that we are very happy to have cable systems carry those games, whether there is a local broadcast station which carries it, or not.

Mr. COPPEDGE. One other point, as one of the committee members who negotiates with the major broadcasting companies for the NCAA football package, if there are too many—if it happens frequently that you

have regional problems, then you cannot sell that product, besides doing damage to the gate by the teams, all the teams in that region. The product goes down in its value.

Mr. KASTENMEIER. I yield to the gentleman from California.

Mr. DANIELSON. Thank you, Mr. Chairman.

Thank you, gentlemen. Your statement is very clear and I do not really have any questions on the substance of it.

It is my understanding that you really are not anxious about royalty fees, license fees, but what you are concerned about is the damage that can be done to the institution of collegiate athletics through compelling teams to compete with television or cable broadcasts of other games which might have a great public interest, thereby cutting your gate?

Mr. COPPEDGE. That is correct. To carry it to its extreme, if you are able to do that, you would end up with 10 super teams in the country and they would be the only ones on TV all the time.

Mr. DANIELSON. Well, the economic aspect of having your gate diminished is terribly important here. That is not the only thing. A lack of attendance tends to destroy interest in the teams, and in the activities, generally.

It could have an adverse morale effect upon the entire athletic program of our colleges and universities.

Mr. COPPEDGE. Many of these so-called division 3 schools, which are the smaller athletic programs, do not even charge for their games.

Mr. DANIELSON. I also know that major schools—at least those who can come up in the black on the football, for example, or basketball—usually will use those profits to support other athletic programs intramural or intercollegiate programs which do not support themselves financially.

Mr. COPPEDGE. We support 21.

Mr. DANIELSON. In my own area, we had Occidental University in California. It used to have a fine football team. But they simply cannot compete today. They discontinued I think, starting with Chicago 30 years ago. There has been a constant attrition because of the inability to compete.

I am very sympathetic to this position. Your position is really not that much different from that of professional athletics. If we are going to have professional athletics, and public policy seems to be in favor of them, then you have got to keep the entire organism alive, not just one or two or three teams.

So, what I really think we need, Mr. Chairman, is legislation which will recognize the unique characteristics of college athletics and the unique characteristics of professional athletics, and provide a sufficient protection in the field of competition so that they can survive.

If the public policy, public interest wants this sort of activity—and I am convinced they do want it—I think that that is a solution. But I really have serious doubts that copyright is the way to do it.

Maybe we should get somebody on Interstate and Foreign Commerce Committee to strengthen the jurisdiction of FCC and give them some guidelines and directions so they would come up with that kind of protection.

I am for the goals you seek. I am just, unfortunately, in doubt that this is the way to do it.

I yield back my time.

Mr. COPPEDGE. I am not a lawyer, but we have been frustrated in trying to get something done. And this certainly, to us, seems an appropriate forum.

Mr. DANIELSON. All right.

Mr. KASTENMEIER. The gentleman from New York.

Mr. BADILLO. No questions.

Mr. KASTENMEIER. Mr. Pattison?

Mr. PATTISON. No questions.

Mr. KASTENMEIER. Mr. Coppedge, we appreciate your appearance here today.

This concludes this day's hearings on the question, primarily, of cable television, section 111, and the provision of copyright, until the next meeting on July 10, public broadcasting.

The committee stands adjourned.

[Whereupon, at 5:10 p.m., the subcommittee adjourned until July 10, 1975.]

[Subsequently, the subcommittee received statements from National Broadcasting Co., Inc.; American Broadcasting Cos., Inc.; Lester W. Lindow, executive director, Association of Maximum Service Telecasters; William J. Bresnan, President, Cable Division, TelePrompter Corp.; and Times Mirror, as follows:]

STATEMENT OF NATIONAL BROADCASTING COMPANY, INC.

The National Broadcasting Company, Inc. ("NBC") respectfully requests that the following Statement be made a part of the record of this Subcommittee's hearings on the proposed bill to revise the copyright laws (H.R. 2223).

NBC operates major television and radio networks and is the licensee of five television and eight AM and FM radio stations. In that capacity, it is a large purchaser of copyrighted property owned by others, spending in 1974 over $400 million to obtain such property for broadcast use. It is also a copyright owner of some programming, primarily news and documentary programs. The proposed statute will affect NBC in both capacities.

Most of the provisions of the proposed statute tend either to codify existing law, to remove some of the uncertainty of the existing case law on copyright, or to create new rules which better reflect the substantial technological changes which have occurred since 1909, the date the last major copyright bill was enacted.

One section—Section 111—expresses an extremely significant legislative policy toward cable television and copyright. Because of the importance of this Section to the communications industry as a whole, we will address most of our comments to it.

Finally, we are submitting comments on H.R. 7059, which would establish a "performance right" in sound recordings, in addition to the current rights which composers and authors have in the underlying music or literary property embodied in the recording. This provision could also have a substantial economic impact on the broadcasting industry, particularly on radio stations which are major users of sound recordings.

SECTION 111

Section 111 is significant because it establishes for the first time the principle that cable television should have some copyright liability when it retransmits television programming broadcast by existing television stations.* Since its inception, cable television has not been required to make payments to the copyright

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*A critical distinction must be made between the transmission by cable of "local" broadcast signals and "distant" signals. Cable systems that merely retransmit or amplify local signals expand the potential audience for a program within the same market by delivering signals which might otherwise be blocked within the originating station's broadcast area. The low rates contained in the fee schedules of Section 111 would not, therefore, be unreasonable with respect to such activity.

We are addressing ourselves primarily to the activity involving "distant signal importation," where cable retransmits a signal from a distant market into a different market not otherwise able to receive it. This activity introduces a new program into that market and thus raises different policy considerations.

owners of such programs, primarily because of judicial interpretation of the technical wording of the 1909 Copyright Bill, drafted long before the current cable technology was even envisioned. Nevertheless, cable television is a commerical user of copyrighted property, does charge the public for the right to see such programs, and in this sense, is no different from any other user of copyrighted property. The statutory recognition of cable's obligation to pay copyright fees is thus a significant development.

Some have argued that cable should forever be exempt from copyright liability as a way of stimulating the future growth of that cable industry. This, in turn, is thought desirable because a strong cable industry is seen as adding to the diversity of entertainment programming that wlil be available to the American public, particularly entertainment intended for more sophisticated or minority tastes and interests.

We do not quarrel with the goal of diversity. However, it is difficult to see how that goal is furthered by an exemption which only encourages cable to retransmit entertainment programs that are already in existence. When cable retransmits an existing signal, it is not creating anything new and thus is not contributing to diversity.

Moreover, it is difficult to see how the constitutional objectives of copyright are furthered by such an exemption. The purpose of affording copyright protection to a literary, artistic or audiovisual work is to stimulate the creation of such property by giving their creators the opportunity to maximize their economic reward. When cable retransmits a program shown by an existing television station, particularly into markets where the program is not otherwise available, it is as much a user of creative property as the original television station which bought and paid for the right to broadcast the program. Yet, cable has not paid the owner of such a program for the right to use it in the market. This, of course, deprives that owner of revenues he might have obtained, and, at the same time, diminishes the value of any future sale he may wish to make in that market, thus defeating the basic objective of copyright.

For these reasons, we support the provisions of Section 111 which in principle treat cable equally with any other user of copyrighted property.

At the same time, Section 111 adopts a system of compulsory licensing based upon a fee schedule which, in our judgment, is so low as to represent only a token payment. We estimate that most non-network owned stations may spend as much as 42% of their broadcast revenues for programming and that the major television networks may spend as much as 80%. The MPAA has estimated that approximately 54% of broadcast revenues must be used to acquire programming. The NAB put the average at 34%. For present purposes, it does not matter which estimate is correct—under each of these estimates it is clear that the fee schedule contained in the proposed statute would obligate cable to pay an insignificant percentage of its revenues for the right to use existing programming.

Moreover, the fee schedule does not adequately reflect the value that cable derives from being able to use existing television programs. There is no question that cable obtains increased penetration and profits from distant signal importation. Yet, the proposed fee schedule does not appear to take such incremental profits into account.

Thus, while the proposed statute does give some recognition in principle to the similarities between broadcasters and cable with respect to copyright liability, it does not attempt to apply that principle to anything approaching a realistic basis to carry out the objectives of that principle. As a practical matter, this deficiency may negate the beneficial public policies that are served by imposing copyright liability in the first place.

We recognize that it is not practical or wise for the Congress to become the final arbiter of prices that are usually determined in arms-length negotiations between copyright owners and users. We therefore support the concept of creating a Copyright Tribunal which would have the power to establish a more realistic and reasonable fee structure. We believe that the Congress should make clear that the fees contained in the current statute are merely a temporary starting point which can and should be reviewed promptly by the Tribunal. This would have the advantage of removing the Congress from the difficult, delicate and continuing job of fixing reasonable copyright fees and at the same time, allow for the flexibility that is needed to assure that the fee structure is, and continues to be, fair and reasonable.

The need for such flexibility should not be underestimated. The communications industry is dynamic, volatile and everchanging. No one can predict what future technological changes will occur and what relationships will emerge

among all of the competing elements. It would be unrealistic and unwise to establish now a fee structure that can never be changed or which would not reflect future developments. The creation of a specialized tribunal which can monitor these changes and make necessary adjustments as new developments occur and different relationships are created is thus a far wiser course for the Congress to follow than alternatives which are based on a status quo which is not likely to stay the same.

H.R. 7059

H.R. 7059 creates a separate performance fee for the use of sound recordings. As a major user of records, we oppose the imposition of additional charges for the right to play records on the air.

Some have argued that such a performance fee is necessary to create a new revenue base for lesser-known musicians and talent who participate in the creation of a sound recording. However, the current bill does not appear to give those musicians and artists any substantial benefit. Under the bill, 50% of the revenues to be generated by the fees go immediately to the record companies. Of the remaining 50%, only those musicians and artists whose records are played on the air are entitled to compensation. Since most radio stations with popular-music formats generally play the records of the most popular performers—most of whom are already well paid by their record companies—it is unrealistic to think that lesser-known musicians or artists will receive anything of significance.

Both record companies and performers have always recognized that there was an advantage in having their records used by radio stations. That is the reason most records are supplied without charge. We see no reason why Congress should now create a new revenue base for manufacturers. H.R. 7059 will force broadcasters to pay record companies for the "privilege" of increasing their record sales. That is not the purpose of the Constitutional guarantee of copyright protection.

Similarly, it strikes us as being unwise for Congress to involve itself in creating a new revenue base for performers. The compensation that performers receive should remain a function of private negotiation, not national legislative policy.

At present, broadcasters must pay performing rights societies (ASCAP and BMI) for the right to use copyrighted musical works. If they also must pay record companies for the right to play records of the same copyrighted musical work, the expense may double. There will also be added administrative costs. We thus oppose H.R. 7059 as an unwise extension of what is validly needed "to promote the useful arts and sciences."

We appreciate the opportunity to present our views to this Subcommittee.

Statement of American Broadcasting Companies, Inc.

American Broadcasting Companies, Inc. ("ABC") operates one of the three national television networks and five television stations. It respectfully requests that the following statement and appendices be made part of the record of the hearings on H.R. 2223.

I.

ABC has long been concerned with the potential impact of developing cable television services on the continued economic health and viability of the country's present nationwide system of free television service, available to all the people at no direct charge. One of the aspects of cable television which led the Federal Communications Commission, in 1965 and 1966, to undertake regulation of that industry, is the essentially unfair nature of the service from the standpoint of competition. The cable television industry builds its profits on the work product and investments of others.

While ABC has recognized the value of traditional cable television, providing needed supplemental service where over-the-air reception is marginal, it has been many years since the industry moved well beyond that original role. The industry is now clearly bent upon providing its services to the major urban centers of our nation through the importation of multiple television signals from distant cities, the origination of programming and the development of pay cable services, very likely, in the near future, on an interconnected, network basis. It is unrealistic to consider the problems of cable television as if it were still an infant industry undertaking to provide supplemental service to small communities and

marginally-served areas. It is, today, a competitive factor in national telecommunications and all reliable predictions suggest that its growth and impact, in the next decade, will be extremely significant.

For these reasons, ABC urges that the industry be subjected to normal and traditional copyright obligations. We still believe that the most prudent and the fairest way to deal with cable television, at least in the big cities and where origination and pay cable services are being, or will be, offered, would be to require the operator to go into the marketplace and bargain and pay for all of its program product just as radio and television stations do. Any contrary course—either of exemption from copyright liability or according the extraordinary privilege of compulsory licensing—interferes dangerously with normal marketplace considerations and threatens a situation where the effectively subsidized cable industry may destroy or seriously impair the services of the television industry which is still required to compete for program product in the traditional manner.

In 1971, as many witnesses have described, a so-called "Consensus Agreement" was reached by the National Cable Television Association, National Association of Broadcasters, Maximum Service Telecasters and a committee of the major program suppliers under the auspices of the Office of Telecommunications Policy. While ABC was not a formal party to the agreement, it did indicate its reluctant acceptance of its principles. ABC did so out of a spirit of compromise, recognizing that issues arising from cable development were highly complex and controversial and that the interests of the public suggested the wisdom of an early definitive resolution of those issues. That compromise was appended to, and provided a substantial basis for, the Commission's 1972 Report and Order adopting definitive cable regulation.[1]

Almost immediately following adoption of the Report, the FCC, based upon continuous importunings from the cable industry based on claims of alleged financial distress, began relaxing those major elements of obligation and restraint accepted by the cable industry in the Compromise, and which were the *quid pro quo* for broadcaster acceptance of privileges accorded to cable operations.

The Congress should consider the following record of abandonment by the FCC of public service obligations which were to be created in return for the privileged carriage of broadcast signals.

a. In 1972, the Commission envisioned "a future for cable in which the principal services, channel uses and principal sources of income, will be from other than over-the-air signals."[2] As a result, the Commission required the provision in larger markets of 20-channel service and channels dedicated to public access, governmental and educational use. Yet, the Commission, today, is proposing that these requirements either be abandoned altogether or compliance postponed indefinitely (See Docket Nos. 20363 and 20508).

b. Equally, in 1972, the Commission justified its departure from the norms of competition because subsidized carriage of broadcast signals would give:[3]

> ". . . cable impetus to develop in the larger markets without creating *an unacceptable risk of adverse impact on local television broadcast service.* At the same time, these limits should serve to create an incentive for the development of those nonbroadcast services that represent the long-term promise of cable television and *are critical to the public interest judgment we have made.*"

At this time, however, the public services called "critical to the public interest judgment we have made" are in the process of being repudiated by the cable industry and abandoned by the Commission.

The Congress should also consider other actions taken by the Commission which have abandoned those undertakings designed to avoid "an unacceptable risk of adverse impact on local television broadcast service" or which have relieved the cable industry of any public service obligations.

a. In 1972, the Commission required systems with more than 3,500 subscribers to originate significant programming locally. That requirement has been eliminated (Docket No. 19988).

b. In 1972, in order to preserve the balance between free television and cable television, the Commission had reasonably adequate requirements for protecting local stations from duplication of their network programming. That re-

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[1] *CATV*, 36 FCC 2d 143 (1972).
[2] *Cable Television Report and Order, supra* at 190.
[3] *Cable Television Report and Order, supra* at 165.

quirement, at the urging of the cable industry, has now been significantly eroded (Docket No. 19995).

c. In 1972, the Commission had reasonably adequate rules to prevent program siphoning by pay cable systems. Those rules, again at the urging of the cable industry, have been relaxed so that cable can carry massive amounts of films, series and sports programming—not public service programming (Docket No. 19554).

d. In 1972, the Commission promised the television industry that it would undertake "expeditiously" to place necessary limitations on the carriage of sports events by cable through distant signals. Limitations, energetically resisted by the cable industry, have not yet been adopted, more than three years after proceedings were instituted (Docket No. 19417).

e. And, in 1972, the Commission explicitly promised to review its cable program if copyright legislation, critical to the balancing of public interest concerns, was not forthcoming:[4]

> "Finally, we reach ABC's contention that the Commission will have to take action if copyright legislation is not forthcoming within a reasonable period of time. We agree with this position, and have so stated in Paragraph 65 of the Report. It would be premature to speculate now what action would be necessary in that event. *We hope never to reach that point since it is our expectation that the parties will expeditiously reach an accord and that copyright legislation will be enacted once these rules become effective.* [Footnote omitted]. We have decided after much study and debate to take the first step. We will revisit the matter if our estimate proves wrong that adoption of our program will facilitate copyright legislation."

The interim, despite continued absence of legislation, has brought nothing but the most energetic processing and grant of certificates of compliance—both for new and the pre-March 31, 1972 systems.[5]

III.

ABC believes strongly that the Commission has been most ill-advised in accepting, uncritically, the cable television industry's claims of financial distress and thus abandoning both its balancing decisions and public interest requirements. We believe the Congress would be equally ill-advised should it proceed on the same assumption.

We are attaching hereto, as Appendices A & B, newspaper and trade press references evidencing the most optimistic predictions for cable growth; the marked increase in the value of cable stocks; substantial stock acquisitions by "insiders"; and, particularly, the very bullish predictions for rapid expansion of pay cable services.

The Congress should not be deluded into believing that the legislation before it is a relief measure for the traditional "Mom and Pop" CATV operation. It is dealing with a major, rapidly growing, force in national telecommunications which has been effective in hiding behind the shield of the small operator.

IV.

While ABC, for these reasons, would still prefer full copyright liability for cable services (with possible exemptions for smaller systems in underserved areas), we realize that the principle of compulsory licensing may have advanced too far now to be abandoned. ABC does believe, strongly, however, that the Congress should not contribute further to destruction of the careful balancing of private and public interest considerations embodied in the Consensus Agreement. The Consensus Agreement contemplated copyright legislation essentially as follows:

(1) Compulsory arbitration of the question of fees to be paid in the event copyright owners and cable owners could not agree on a schedule.

(2) A limitation on the applicability of the extraordinary compulsory license privilege to those television signals originally authorized for carriage by the FCC in 1972.

(3) An exemption for independently owned systems with fewer than 3,500 subscribers.

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[4] *Reconsideration of Cable Television Report and Order,* 36 FCC 2d at 197. (Emphasis supplied.)

[5] The Cable Television Bureau advises ABC that, since 1972 through February 1, 1975, 4,690 application for certificates have been filed; 3,561 granted; 838 remain pending; and 291 were either denied or dismissed.

(4) The right, in broadcasters and copyright owners, to enforce exclusivity rules through court action for injunction and other appropriate relief.

It will be recognized that these provisions represent a radical departure from those marketplace considerations which, traditionally, have governed the relationship of those who create original work and those who use it for profit.

The principle of compulsory licensing, even if limited to those signals authorized in 1972, is a significant reduction in the rights of program producers, in a free and competitive market, to bargain for fair payment, based upon the relative worth and value of particular works. But if this remarkable principle is to be adopted, a fair schedule of payment is essential. It is clear that the interested parties have not even come close to agreement on such a schedule. We, therefore, strongly believe that rather than placing in the statute an arbitrary schedule of fees, compulsory arbitration, as contemplated by the Consensus Agreement should be provided for as the traditional and fair way to settle disputed issues.

In addition, a Copyright Tribunal should be provided for. A means of adjusting whatever original schedule is decided upon is essential to preserve any measure of equity in the years to come. The Congress, as a practical matter, is not in a position to re-visit and re-adjust these fees in light of future developments. Provision for an administrative body for that purpose is necessary.

Plainly, any compulsory licensing decided upon should be limited to those signals authorized in 1972. Otherwise, the Congress would be granting an open-ended license for a free-wheeling carriage of an unlimited amount of programing belonging to others. With all respect to the Federal Communications Commission, as we have documented above, it has not shown a capacity to resist the pleadings of the cable industry for more and more privileges. We do not believe that it will be more successful in resisting requests for additional signals under the umbrella of a fixed compulsory license.

Total exemption from copyright liability of particular systems, based upon number of subscribers or upon gross, is an even more radical departure from tradition than is the compulsory license. We find no precedent for a significant exemption from copyright law. The Congress should consider the thousands of small businesses (smaller than those cable systems with, for example, 3,500 subscribers) which must, nonetheless, pay music licensing fees or other trademark and copyright fees. ABC has difficulty understanding why the cable industry should be singled out, from among all of the small business activity in this country, for wholesale relief from payment while profiting from the work of others. Since an exemption was a part of the original Consensus Agreement, ABC did, reluctantly, accept the principle. Only, however, if all the other provisions of the Consensus Agreement were embodied in legislation should the Congress consider retaining this virtually unprecedented aspect.

Finally, enforcement of the exclusivity rules through the courts is a necessary and traditional remedy to insure that the substance of legislation and regulation decided upon is, in fact, effective. The administrative process, distracted by its many responsibilities, has already shown itself incapable of providing fair and effective relief, promptly, against multiple regulatory violations.

V.

There is no adequate reason for the Congress to step away from the principles which were agreed upon in the Consensus Agreement. That agreement, itself, represents a substantial compromise of those traditional copyright principles which one would have normally expected would govern a growing and rapidly expanding industry which depends for its profit upon the work of others and, at least at the moment, pays nothing for that work. ABC urges the adoption of legislation reflecting, at a minimum, the principles, described above, and derived from the Consensus Agreement.

Appendix A

a. *The N.Y. Times* for March 13, 1975 (p. 56, 62), in an article by Vartanig G. Vartan reporting on recent advances in the stock market, states that "Cable television took honors as the best-acting group, displaying an advance of 90.1 percent." The article also adds:

> "Dennis Leibowitz, an analyst with Coleman & Co., also noted that declining interest rates benefited CATV companies with heavy capital expenditures. Another favorable factor cited was the prospect of liberalized regulations by the Federal Communications Commission, particularly with reference to pay TV."

b. Kagan's *Cablecast* of March 3, 1973 reports on five MSO's revenue increases for 1974 over 1973: *ATC* up 30 percent; *Cox* up 27 percent; *CPI* up 16 percent; *UA-Col.* up 35 percent; and *United* up 16 percent. Kagan concludes: "All in all, they're the kind of figures that would lead one to wonder what all the flap was about in the market for cable stocks . . . *ATC*, for example, traded at only 1.5 x trailing cash flow when its stock dropped to $6 . . ." (p. 3).

c. The same issue of Kagan's *Cablecast* (p. 4) also states:

"David Wicks of *Warburg, Paribas Becker, Inc.*, surveying cable lenders vis-a-vis FCC 1977 rebuild rules, found none willing to make loans for what they call '*government compliance*' . . . *monies are available only for generation of profits. . . .*"

and

"*Burnup & Sims*, bearing up under strain of reduced telephone and cable construction, is one way to play increase coming in investment tax credit. President Tom Pledger recently told Florida investment group that 'a relatively small part of our revenues are derived from CATV (but) surprisingly, we see more positive signs of new work appearing in this area than in any other segments of our operations'."

d. More from the same issue of *Cablecast* (p. 1):

"Irving Kahn for NCTA President! He's as good a p.r. man as the cable industry has ever known.

* * * * * * *

"Based on his reunion speech in Dallas at the Texas Convention last week (2/27), Irving's year-and-a-half in government service sharpened both his perception and his tongue. *Here's his financial commentary:*

'Wall St. discovered cable about a year or two too late, took the cable stocks up perhaps several points too high and then, hand in hand, we and they fell into an abysmal chasm.

'We as an industry contributed to this fall by offering sometimes-less-than-terrific management, some rather poor information, and anything but a greater return.

'We were victimized, I suppose, by our own dynamic growth; it was a case of too much too soon.

'But the point of all this is not to fix blame. The fact of the matter is, from Wall Street's point of view we should—and can—still be considered one of the best investments going at the moment.

'In spite of ourselves and our negativism, we remain a business whose opportunities are greater than they've ever been, with cash-generating possibilities beyond the comprehension, apparently, of many of our colleagues.'

* * * * * * *

"Cable today offers as great an opportunity for financing as it ever has. If we can convince our industry's own management class to believe it, then we can convince Wall Street to believe it.

'But if we play dead, we are dead.' "

e. Mr. Hagan adds:

"We know more than one cable executive who knows darn well his subscribers are worth a lot more than $150 each. But when you're buying them up at 50 cents on the dollar your p.r. man doesn't get many assignments.

"In our view, at least, the ultimate test of management's faith in its future is its willingness to put its own money on the line when all about are in a state of panic.

"Thus it was with more than passing interest that we noted these astute purchases of cable stock by insiders, as listed in the latest SEC records:

Officer	Company	Shares bought	Date	Price
John Gwin	Cox Cable	1,000	Dec. 31, 1974	$4.80
Henry Harris	do	1,000	Dec. 17, 1974	3.75
Marc Nathanson	Teleprompter	1,000	Dec. 9, 1974	1.50
Alan Fleisch	do	1,000	Nov. 29, 1974	1.65
Ralph Baruch	Viacom	1,500	Dec. 20, 1974	2.88
Terry Elkes	do	500	Dec. 18, 1974	2.75
Do	do	500	Dec. 23, 1974	2.65

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"*In the next issue of CABLECAST:* a report on the economy—why we think it's in better shape than it looks on the surface; how stimulation in

the money markets will help the cable industry (and benefit cable stocks); the true relevance of pay TV and cable TV; the FCC's comprehension of cable economics; in short, the birth of the next era in cable television."

We estimate there are 190,000 pay TV subscribers on cable TV systems in the United States.

This figure is based on a survey conducted by PKA during the past week which shows there were 188,835 customers as of Apr. 1 (see P. 3).

Perhaps a third of the 62 cable systems currently offering premium movies and sports programs are in active marketing campaigns. And we are aware of at least another half-dozen imminent start-ups. These include:

Times Mirror in Palos Verdes, Cal.; Davis Communications in Oxnard, Cal. (in June); United Cable in Tulsa (June 1); UA-Columbia in San Angelo, Tex. (Apr 16); Pasadena, Tex. Cablevision (May 1).

The pay-cable industry added some 140,000 subscribers in the past 12 months. We estimate growth in the next 12 months at an additional 160,000-to-175,000 subscribers.

PAY TV POPULATION

Cable system	Operator	Sales affiliation	Program source	Pay-cable subscribers, Apr. 1, 1975
1. Los Angeles, Calif	Theta	None	Telemation	26,000
2. Long Island, N.Y	Committee Development.	do	Home Box Office	20,365
3. San Diego, Calif	Cox/ATC	Channel 100	Telemation	20,000
4. New York, N.Y	Time	None	Home Box Office	11,200
5. Wilmington, Del	Rollins	do	do	8,500
6. Concord-Walnut Cr., Calif	Western/GE	Channel 100	Telemation	7,000
7. Quint Cities, Iowa-Ill	Cox	do	do	6,750
8. Toledo, Ohio	Buckeye	do	do	6,500
9. Allentown, Pa	Service Electric	None	Home Box Office	5,400
10. Wayne, N.J	UA-Columbia	do	do	3,900
Brookhaven, N.Y	do	do	do	3,900
12. Santa Barbara, Calif	Cox	Channel 100	Telemation	3,500
13. Decatur, Ga	Davis	None	Channel 6	3,350
14. Islip, N.Y	Teleprompter	do	Home Box Office	3,300
15. Flint, Mich	Lamb	Channel 100	Telemation	3,250
16. Harrisburg, Pa	Sammons	do	do	3,000
Wilkes-Barre, Pa	Service-Electric	None	Home Box Office	3,000
18. Burlington, N.J	Transcable	do	do	2,620
19. Spring Valley, N.Y	Goodvue	do	do	2,110
20. Mt. Vernon, N.Y	Teleprompter	do	do	1,970
21. Pensacola, Fla	Davis	do	Channel 6	1,850
22. Ithaca, N.Y	Ceracche TV	do	Home box office	1,820
23. Reston, Va	Warner	do	Star channel	1,755
24. Sarasota, Fla	Storer	Motorola	Motorola	1,700
25. Ft. Lauderdale, Fla	American Video	None	Telemation	1,660
26. Hazelton/St. Clair, Pa	Service Electric	do	Home Box Office	1,625
Pottsville, Pa	Warner	do	Star channed	1,625
28. Escondido, Calif	Times Mirror	do	Telemation	1,515
29. Haverstraw, N.Y	Transcable	do	Home box office	1,510
30. Fayetteville, Ark	Warner	do	Star channel	1,460
31. Endicott/Vestal, N.Y	Pioneer	do	Home Box Office	1,425
32. Wappingers Falls, N.Y	U.S. Cable	do	do	1,400
33. Corning, N.Y	New Channels	do	do	1,375
34. Binghamton, N.Y	do	do	do	1,320
35. Pittsfield, Mass	Warner	do	Star channel	1,220
36. Winter-Haven, Fla	do	do	do	1,130
37. Mehanoy City, Pa	Service Electric	do	Home Box Office	1,100
Olean, N.Y	Warner	do	do	1,100
Anderson, S.C	Davis	do	Channel 6	1,100
Peekskill, N.Y	Transcable	do	Home Box Office	1,100
41. Bradford, Pa	Warner	do	do	1,070
42. Lansford/Lalnerton/Stroudsburg, Pa.	Blue Ridge	do	do	1,050
43. Long Beach, Calif	Times Mirror	do	Telemation	1,040
44. Onconta, N.Y	New Channels	do	Home Box Office	1,000
45. Easton, Pa	Salmons	Channel 100	do	975
46. Coos Bay, Oreg	Warner	None	Star Channel	940
47. Beacon, N.Y	U.S. Cable	do	Home Box Office	850
48. N. Palm Beach, Fla	Perry Cable	do	Telemation	800
Honolulu, Hawaii	Oceanic	do	do	800
Warren, Pa	Warner	do	Home Box Office	800
51. Columbus, Ohio	Telecinema	do	Telemation	700
52. Amsterdam, N.Y	Gateway	do	Home Box Office	660
53. Mt. Kisco, N.Y	Martin Stone	do	do	650
54. N. Syracuse, N.Y	Frank Harms	do	do	515
55. Nazareth, Pa	Service Electric	do	do	400
56. Carbondale, Pa	David Adams	do	do	385

PAY TV POPULATION—Continued

Cable system	Operator	Sales affiliation	Program source	Pay-cable subscribers, Apr. 1, 1975
57. Shamokin, Pa	S.Electric/Pennsylvania Relay.	do	do	395
58. Emmaus, Pa	Salmons	do	do	360
59. Mt. Carmel, Pa	Service Electric	None	do	300
60. ———, Pa	John Arnts	do	do	290
61. Venice, Fla	Storer	Motorola	Motorola	250
62. Huntington, N.Y	Jim Nishicura	None	Home Box Office	200

[From the Wall Street Journal, Apr. 11, 1975]

TIME INC. UNIT TO USE SATELLITES TO DELIVER PROGRAMS TO UA-COLUMBIA CABLE SYSTEMS

NEW YORK.—Home Box Office Inc., a network packager of entertainment and sports programming for cable-television systems, and UA-Columbia Cablevision Inc. announced plans to distribute Home Box Office programming by domestic satellite to UA-Columbia cable systems in various parts of the country.

The companies said they agreed to have Home Box Office, a subsidiary of Time Inc., expand its present network by satellite to seven UA-Columbia systems in Florida, Texas, Arizona, California and Washington. Home Box Office currently uses only microwave transmission and services cable systems only in the Northeast, including UA-Columbia systems in Wayne, N.J., and Brookhaven, N.Y.

The expanded Home Box Office network, parts of which are scheduled to begin service in October, would constitute the first use of domestic satellites to transmit TV entertainment programming on a regular basis. Gerald M. Levin, president of Home Box Office, said it also will "provide the framework for a truly nationwide pay TV system" by making Home Office's "pay TV" service available to cable systems around the country.

NEWS BY SATELLITE

Earlier this year, Television News Inc., an independent television news service, announced plans to transmit its daily news feed to subscribing TV stations by satellite, starting in July. The Public Broadcasting Service also is considering satellite transmission of programming but hasn't decided on a plan.

Home Box Office provides current-release motion pictures, live sports events and special-interest programming to cable systems in New York, New Jersey, Pennsylvania and Delaware. It said it plans to transmit 70 hours a week on each of the two channels provided by RCA Global Communications Inc., a unit of RCA Corp. Robert M. Rosencrans, president of UA-Columbia, said his company will purchase seven earth stations to receive the signals, at a cost of about $75,000 for each station.

UA-Columbia has more than 180,000 primary cable-TV subscribers in 52 systems in 15 states. About 40% of the company's 10,000 Wayne, N.J., subscribers currently pay an additional fee for the Home Box Office programming, while 4,000 of the 24,000 Brookhaven, N.Y. subscribers have asked for the service since it was offered four months ago. Mr. Rosencrans said UA-Columbia anticipates reaching a 40% saturation point in the seven new systems that will offer Home Box Office programming.

ENCOURAGE PAY TV'S GROWTH

Home Box Office's Mr. Levin suggested yesterday that by making programming more accessible, the satellite transmission would encourage the growth of "pay TV" by cable-system operators. According to Paul Kagan, an industry analyst and the publisher of an industry newsletter, only 190,000 of the nation's 10 million cable TV homes currently subscribe to some type of "pay TV" service.

"Other earth stations in the area near the UA-Columbia earth stations could be served by microwave, and the same transmission from a single orbiting satellite can feed the Home Box Office programming to other earth stations positioned throughout the U.S.," Mr. Levin said.

The satellite transmission will be cheaper than using telephone company landlines, according to UA-Columbia's Mr. Rosencrans, and will provide a higher-quality product than the videocassette distribution of programs. It also will make "live" programming possible on a national basis.

TECHNICAL QUESTIONS REMAIN

But several industry observers cautioned yesterday that the extent to which additional cable systems might buy the satellite transmissions would depend on the resolution of some technical questions regarding the actual operation of "pay TV" hardware in homes. And, Mr. Kagan added, "how many people will want to build earth stations and how many people will actually want to pick up the (Home Box Office) signal is another question."

UA-Columbia said its systems taking the Home Box Office service are in Ft. Pierce and Vero Beach, Fla.; Ft. Smith, Ark.; Laredo, Texas; Yuma, Ariz.; El Centro, Calif., and Pasco and Kennewick, Wash. They have a total of 85,000 subscribers.

UA-Columbia and Home Box Office added that their agreement is subject to Federal Communications Commission approval.

[From the Wall Street Journal, Apr. 22, 1975]

CABLE-TELEVISION ISSUES RECEIVE HEFTY BOOST FROM TIME INC.'S PROPOSAL FOR USE OF SATELLITE

(By Charles J. Elia)

The juices have started flowing again in the cable-television stock group, one of the more battered victims of last year's lofty interest rates.

The stocks have been up and running since early this year, particularly those of companies considered the strongest financially. But the group received an added fillip in the past couple of weeks with the announcement by Time Inc. that it's planning to expand its Home Box Office pay-TV operation by use of a satellite.

"No question," says Paul Kagan, head of an advisory service on communications investments, "this means a service to cable-system operators that gives them some upside potential once again. It has brought some of the glamour back to the industry."

Even though Time's ambitious pay-TV plans may be two years from returning the publishing company any profit—its cable and pay-TV operations had a pretax operating loss of $8.7 million last year—the move seems to have done wonders also for Time's stock. Since Time announced plan on April 10 to provide satellite transmission to pay-TV programs to UA-Columbia Cablevision. Time stock has climbed from 36¾ to a new 1975 high of 46½ yesterday, it closed at 44¾.

Time has about 10 million shares outstanding, so the response to the news, even as Time was also announcing lower earnings, was a markup of the company's market value by about $80 million.

"That strikes me as somewhat ridiculous," says Denis McAlpine, analyst at Tucker, Anthony & R. L. Day, who views the development as favorable for cable companies. "Substantial costs will be incurred by Time on this project and it's hard for me to reconcile the move in the stock with the uncertainty over when Home Box Office will contribute to profits."

J. Richard Munro, vice president in charge of Time's video group, said yesterday the company is incurring costs of $2 million a year in acquiring satellite facilities from RCA Corp. and that this is likely to help push the break-even point for Home Box Office into 1977 from an earlier target of late 1976. "Our primary aim now is to convince more cable companies to start building receiving stations," he said.

Bulls on Time are undaunted, however. Roy Furman of Furman Solz Mager Dietz & Birney lauds the move as a "extremely innovative and well-financed program that offers bright promise if it continues to catch on." Mr. Furman estimates Home Box Office, currently transmitting by microwave relays, has boosted the number of pay-TV subscribers in systems using its services to an estimated 100,000 from 8,022 at year-end 1973 and from 57,715 at year-end 1974. Both the number of subscribers and the rate of cable companies under contract are growing, he says.

Meanwhile, analysts expect Time earnings to drop this year. Mr. Furman is estimating net at $4 a share, down from $5.01 last year. Merrill Lynch, Pierce, Fenner & Smith last week lowered its estimate, to $4.20 a share from $4.45 a share, because the company's profit-making operations—publishing and forest

products—"are encountering greater difficulty" than expected. Nevertheless, Merrill Lynch upgraded Time stock from "okay to sell" to "okay to buy" because of the pay-TV potential and an upturn it expects in 1976.

Time Inc. officials couldn't be reached for earnings comment. At the annual meeting last week, James P. Shepley, president, said he anticipates second quarter net will be below the year earlier's $1.65 a share, but expects improvement in the second half if the economy recovers. In the first quarter, net was 80 cents a share, down from $1.01 a year earlier.

Mr. Shepley added that Home Box Office is expected to be a national network in 1976 but cautioned that the project "is still in the early stages of development with many risks and uncertainties."

Cable-stock analysts generally consider the excitement over Time's plans as an added attraction to a picture that was improving on its own for the sounder cable companies. Since Jan. 3, stocks of major companies have had these moves: Viacom from 3 to 7⅜ yesterday; UA-Columbia (over the counter) from 4⅜ to 11; Cablecom-General (American) from 1⅞ to 4⅞; Cox Cable (American) from 3⅛ to 14⅜; TelePrompTer from 1⅞ to 5; American TV & Communications (over the counter) from 6¼ to 12¼; and Vikoa (American) from 15/16 to 1⅜.

"The stocks have moved up but we think they still have some way to go," says Mr. Kagan. "We think a cable subscriber is worth $300. In the bear market, based on the stock's depressed prices, this dropped to $100 to $150; it's now about $200 per subscriber and we think subscribers will again be valued at $300."

Tucker Anthony's Mr. McAlpine also remains generally bullish. "The quality stocks are still good buys," he says. He would still avoid TelePrompTer until its financial arrangements are more clearly known, he says, but he looks for higher net this year from Cox Cable, American TV, Viacom and UA-Columbia.

Both Mr. McAlpine and Ed Addiss, an analyst at Matthews, Mitchell & Co., regard Scientific Atlanta (American) a builder of earth stations to receive satellite signals, as potentially one of the earliest beneficiaries of a satellite project.

Mr. Addiss says he's bullish long term on cable operators, especially Viacom, but that in light of the sharp price advance of recent months, he has switched from a buy recommendation to a neutral stance.

THE PAY TV NEWSLETTER, NO. 52, APRIL 21, 1975

On April 10, 1975, Home Box Office, the pay TV company owned by Time Inc., announced plans to establish the first national TV network to be transmitted on a regular basis by domestic satellite.

It was an announcement so consummately timed that it earned for HBO effective leadership in this newest of entertainment media.

We expect to see considerable competition, and there are many hurdles to be overcome (see P. 2). But HBO's timely perception of a gap to be filled is refreshing. By giving a divided business community a service no one else was willing to provide, HBO has earned the top spot on the pay TV ladder.

The announcement of April 10 was not HBO's alone. It was the decision of RCA to lower satellite transponder tariffs and of UA-Columbia Cable to order six earth stations that enabled HBO to make its long-term commitment.

The announcement three days later that American TV & Communications, another cable operator) and 8% owned by Time, incidentally), would also build earth stations, could not have been a complete surprise to HBO.

And HBO's decision may appear even less risky if, as we expect, New York City's Lincoln Center agrees to put its cultural events on the satellite.

Whatever the details in the background, it is nonetheless a fact that with a guarantee to spend $1.5 million a year for five years' worth of satellite capacity, HBO has gained an overnight image as the satellite network.

Until the announcement, there had been a vacuum in pay TV: no corporate preacher to marry software & hardware.

There were satellite carriers, telephone companies, television networks & stations, cable TV systems, motion picture producers, distributors & exhibitors, sports promoters and black box manufacturers.

But none of them chose to implement a satellite pay TV network. Most were protecting their own existing interests; others were simply unprepared to take the fiscal plunge in these uncertain times.

Even HBO had been talking, as recently as last month, about mailing cassettes around the country in order to expand its present boundaries, which are con-

strained by the limits of microwave technology. At what may have been, historically, the 11th hour, HBO turned skyward.

What has happened here is that someone has breathed life into a concept that was in a state of suspended animation. And that someone is a well-known, and well-heeled, American communications company. A pay TV satellite network is no longer hypothetical. It is only a matter of when the first programs are served on the waiting dishes.

CATV–Under the Wire, April 28, 1975

PROMISES FOR PAY-TV BECOME REALITY IN NEW ORLEANS

Home Box Office announces plans for satellite network, ATC and UA-Columbia commit to earth stations to bring Pay-TV to Florida, the Midwest and the West Coast

An agreement to extend the Home Box Office pay-TV network, presently operating in the Northeast, to Florida, the Midwest and the West Coast by domestic satellite was announced by Home Box Office, Inc., and UA-Columbia Cablevision, Inc. The expanded network will become the first to transmit television programming nationally by domestic satellite on a regularly scheduled basis.

Gerald M. Levin, president of Home Box Office, Inc., a subsidiary of Time Inc., and Robert M. Rosencrans, president of UA-Columbia Cablevision, one of the nation's major owners and operator of cable TV systems, announced the satellite network plan in New York.

Levin said Home Box Office, which has been programming a current release motion picture, sports and special interest pay-TV service to cable systems in four Northeastern states since November, 1972, has reached an agreement for the use of satellite communication facilities to be furnished by RCA Global Communications, Inc. HBO expects to begin satellite transmission in October.

Rosencrans said UA-Columbia Cablevision will purchase earth stations to receive HBO programs by satellite at sites adjacent to cable TV systems it owns at Ft. Pierce and Vero Beach, Florida; Ft. Smith, Arkansas; Laredo, Texas; Yuma, Arizona; El Centro, California; and Pasco and Kennewick, Washington. The systems, he said, have a total of about 85,000 cable subscribers.

HBO service could be offered to the 20,000 subscribers in the Florida systems by late this year, Rosencrans predicted, and the other locations should have satellite service during 1976.

"This will provide the framework for a truly nationwide pay-TV system," Levin stated. "Other cable systems in the areas near the UA-Columbia earth stations could be served by microwave, and the same transmission from a single orbiting satellite can feed the HBO programming to other earth stations positioned throughout the U.S."

Levin said HBO plans to transmit 70 hours a week on each of two channels. "We will be able to accommodate the various nationwide time zones with our programming," Levin said, "and it also will provide flexibility so that we can program to regional or special interests."

Time Incorporated 1974 Annual Report

DEVELOPMENTAL ACTIVITIES

Among Time Inc's. developmental projects is Home Box, Inc., a pay-cable television program network that now provides motion pictures, sports events and special interest programs to over 70,000 pay-TV subscribers on 45 CATV systems in four Northeastern states. By the end of 1975, HBO expects to add another 50,000 subscribers. Such rapid growth should allow HBO to become profitable by 1977–78. However, we recognize that any new business may encounter unexpected difficulties and surprises.

Manhattan Cable Television, Inc., our CATV system serving 60,000 subscribers in New York City, instituted a 50 per cent rate increase in 1974 (from $6 to $9 per month). It was nevertheless able to complete the year with a record number of subscribers, and is projecting a 25 percent increase in subscribers in 1975. Last year it reduced its loss by 40 per cent, and further improvement is anticipated this year.

Manhattan Cable has great hopes for data transmission as a future source of income and initiated service experimentally in 1974.

Computer Television, Inc., a company in which Time Inc. owns a majority interest, is an attempt to develop the hotel pay-TV field. CTI now supplies uninterrupted current feature films for a fee to guests in some 41,500 hotel rooms in 68 hotels belonging to the Hilton, Hyatt, Sheraton, Marriott and Loews chains, among others. Program cards are mounted on TV sets in hotel rooms. CTI is still in the early stages of development and holds all the risks of an unproved venture.

[From TV Communications, May 1975]

THE OPTICAL EFFECT . . . 60.000 SUBSCRIBERS AND NOW MICROWAVE NETWORKING

Out in sunny California an aggressive, professional and young company is proving the future of Pay-Cable today. Optical Systems, already providing programming in 11 cities, is now expanding with microwave networking.

(By Paul Syhen Maxwell, Lone Star Media)

A "willingness to adapt" has brought Optical Systems Corporation from a bright idea to where it is today: an operating pay-cable company.

A real live operating pay-cable company is something everyone in cable television dreamed about back in the halcyon days of blue skies and rising stock prices. Then the prime rate began rising and cable stocks began falling. At the same time, cable companies began retrenchments (in manpower as well as dreams) and it began to look like a recession, if not a depression, had arrived . . . and especially in the cable TV business.

While all of that bad news was being reported on network and local newscasts, in newspapers and magazines, and in the CATV trade press, Optical Systems and its Channel 100 subsidiary were plugging along, making mistakes and learning from them, and inventing a whole new business . . . a whole new business that works.

"ARROWS AND WOUNDS"

Pay-cable originated, like most business dreams, with promotional ballyhoo based on entrepreneurial instincts. At first it was a seat-of-the-pants business. Today, Optical president Alan Greenstadt calls his firm's management philosophy that of "an entrepreneur with controls." From his Touche-Ross days as a financial analyst, Alan has imposed the "standard operating procedure" of rigid guidelines and controls. "There is something written down in this systems manual," Greenstadt asserts, "that tells the man in the field—whether he is a regional manager or a salesman selling house-to-house—what to do about any situation he encounters. This systems manual answers all his questions and sets policy . . . and everyone follows it."

He continues by saying, "We are not selling dreams here. We are an operating company, much like a cable MSO, but, perhaps, more like a television network. Optical Systems owns and operates, like TV O & O's, pay-cable outlets on leased channels. We behave in much the same manner a TV network does toward its owned TV stations. At the same time we sell our programming and technical knowhow to cable operators who then handle their own marketing, billing and so on . . . much like a network affiliate."

NEXT IN LINE

The next step for Channel 100 and Optical Systems is Micro 100 North. It's a comprehensive microwave network intended solely for the distribution of Channel 100 programming (eliminating bicycling). The new network, contracted through MTC (Microwave Transmission Corporation) and its general manager and vice president Noel Young, interconnects the entire San Francisco Bay area with Contra Costa, San Mateo and Santa Clara counties, the Monterey Peninsula and the San Joaquin Valley.

The Micro 100 North communities include Concord, Monterey Peninsula, Stockton and Walnut Creek.

Plans for Optical Systems' immediate future are basically more of the same: continued improvement in operating controls, further development of a "professional managerial staff" (more Greenstadts and Brutacos) and more service for Channel 100 customers.

At the same time this new breed of pay-cable businessmen plan to achieve a favorable earnings statement for 1975. "We will," Brutaco states, "have an earnings per share this year."

From its inception to the present history of Optical Systems has been exciting, trailblazing work riddled with arrows launched and arrows caught. From my observations, Channel 100's archers are on target now.

[From Television Digest, Apr. 21, 1975]

Pay TV & Satellites Lift Convention: NCTA's annual meeting in New Orleans could well be noted, in later years, as point when pay-cable got off ground, literally, as entrepreneurs committed themselves to use of satellites. It's reminiscent of 1960, when industry moved from peanut phase, convening in Miami's Fontainebleau (Old Vol. 15:25 p2).

History may prove pay-cable-satellite combination mere flash-in-the-sky, but nobody thought so in New Orleans last week. Pay-cable sessions, even those at 8 a.m., were SRO (for details see p. 2).

Down-to-Earth Blue Sky: Home Box Office is putting its money where its mouth is in pay-cable and satellites—and it set tone of whole NCTA convention. In news conference, HBO Pres. Gerald Levin said company had contracted with RCA to buy $7.5 million worth of transponder time over 5 years—about 70 hours on each of 2 channels—5:30 p.m.–1:30 a.m. Mon.–Fri. & 1:30 p.m.–1:30 a.m. week ends on one, 8:30 a.m.–4:30 p.m. Mon.–Fri. & 4:30 p.m.–4:30 a.m. week ends on other. He said HBO is looking toward ultimate 24-hour service—and he foresaw as many as million pay-cable subscribers within 5 years

UA-Columbia Pres. Robert Rosencrans outlined plans to spend $70–$75,000 each for 10-meter earth stations, said that applications will be filed within week and that he foresees no complications at FCC.

ATC Pres. Monroe Rifkin gave satellite concept another boost by announcing plans to build, "probably this fall," earth station in Orlando, feed HBO programs to its 9 systems and others in Fla., with potential of 250,000 subscribers. He said ATC "is preparing to develop" domsat reception at other ATC systems.

HBO will start Oct. 1, getting service from RCA, which will use Anik or Westar until it launches own domsat Dec. 11. Each transponder will have 24 channels. Rosencrans said contracts for stations hadn't been let, that Scientific-Atlanta (SA) & Collins are 2 outfits prepared to build. SA Vp Howard Crispin said company has plenty of production capacity.

Levin also said HBO soon will add to its terrestrial network the system in Philadelphia (TPI), Rochester (Bert Harris), Buffalo (Gilbert). Rosencrans said UA became enthused about pay cable when its Wayne, N.J. system achieved 40% pay penetration only 25 miles from N.Y.C., while Suffolk Co. (Long Island) systems are adding 8–900 pay-cable subscribers monthly. Problems, he said, are "R movies" and time zones—former to be met by parental key at receiver, latter by use of 2 transponders on satellite-fed systems. He said that UA will build earth stations at both Yuma, Ariz. & El Centro, Cal.—though they're only 60 miles apart—because they give better control than microwave. "The wraps are off," he said, and "prices are in the range of most systems." Costs of building & maintaining earth stations, he said, are no more than for many multi-hop microwaves.

HBO offers 8 movies monthly, has been producing about 250 live sports events a year—pro & college—plus children's, instructional & cultural shows. Though HBO has flat $8 monthly charge now, Levin envisioned per program charge for "large items."

FCC Comr. Washburn, in panel discussion, said that "government should not set up hurdles" for satellites; that "cost efficiency" will, by late 1970's, make satellites "highly competitive with bicycling videotapes and far below terrestrial microwave costs for similar networking."

Excerpts from comments at various pay-cable panels.—(1) Donald Berner, Allentown, Pa., said his company has developed "sophisticated" remote-control gear, $125 for terminals, offering scrambled pictures. (2) John Atwood, Theta Cable, L. A., reported that, despite 17 TV stations in area, system has 26,000 pay-cable customers; that total system revenues rose from $2.7 million to $9.7 million in 2 years—attributing $3.5 million of increase to pay. (3) HBO's Levin said that fastest growth is in metropolitan areas with good on-air signals; that new systems come on with 98% pay, as in Oyster Bay, L.I., at $14 monthly ($6 basic service, $8 pay); that movies are "lead item" but diversity is needed. (4)

Optical's Alan Greenstadt said film producers "have been very, very lenient about release dates." He also said recession hasn't hurt pay cable—"but accounts receivable are a problem." (5) Irving Kahn, former Teleprompter head, rose from audience to urge operators to "use your own product—then nothing will preclude national distribution." He ventured that pay cable "will change distribution patterns, as TV did. Cable will be first-run." (6) Scientific-Atlanta's Sidney Topol assured delivery of earth stations within 90 days.

In another panel, James Wicht reported on Columbus, O., experience, said 2-way per-program system with automatic billing via computer works well, gives chance to experiment with prices, and average pay-cable home produces $7–$9 monthly; 50% of subscribers take pay service, Jerry Barge, reporting on Pensacola operation, said he uses "negative option," filtering out pay-cable for those who don't want it, charging $3.75 monthly for those who do—and 85% buy service. In Atlanta, on other hand, he had to use converters, because dial was filled. Of 11,300 subscribers, 3,400 take pay cable. Kenneth Canter, San Angelo, Tex., ran through 9 security concepts, from "very soft—honor system" to "very hard—addressable unit mounted on stand." He said technology is "lagging needs in the pay service."

Appendix B

[Excerpt from ABC "Reply to Opposition to Petitions for Reconsideration" in FCC Docket No. 19554, filed June 4, 1975]

Impending Growth of the Pay Cable Industry

Apparently, the principal factor which induced the Commission to relax significantly the anti-siphoning rules is that access to free television's program offerings—particularly, feature films and sports[1]—is necessary to enable pay cable to prosper. The Commission presumably is also convinced that pay cable is a relatively insubstantial industry that does not have enough subscribers or financial capacity to affect adversely the availability of programming to the free television system.

As ABC and others have demonstrated, however, all available evidence points to an opposite conclusion. Public pronouncements by the industry, reflected in trade press reports, indicate imminent and dramatic pay cable growth. In the face of these indicia of expansion, UA–MGM nevertheless insists: "Of course, in the first place there has been no dramatic expansion of cable operations recently, nor is there any evidence to show that expansion is imminent." (Opp., p. 15) This statement is misleading in the extreme.

Looking first to pay cable subscriber projections, the widely-publicized Stanford Report predicts 470,000 such subscribers by the end of 1976, and over 6.4 million by 1980.[2] TelePrompTer, the nation's largest CATV multiple system owner, offers an even more optimistic forecast—over 500,000 pay cable subscribers by the end of 1975, with an increase of 300% to 1.5 million by the close of 1976. (*Television Digest*, May 19, 1975, p. 5). A recent newspaper article similarly notes that members of the CATV industry feel that new sources of programming, combined with reduced pay cable hardware costs, will increase the number of subscribers "to more than one million within the next two years." (*Wall Street Journal*, May 30, 1975).

What these projections mean in terms of potential pay cable purchasing power is reflected in the recent testimony of Robert Weisberg, President of Telemation Services, before the Senate Antitrust and Monopoly Subcommittee.[3] In response to a question from Subcommittee Chairman Hart concerning the extent to which the prospective economic power of pay cable could be employed to siphon off attractive product from the free television system, Mr. Weisberg stated, "Even when we have 2 million subscribers on pay cable, we will only be able to pay about $500,000 to $600,000 per movie." (Transcript, p. 160). With 6.4 million pay cable subscribers by 1980, pay cable will thus have available "only" $1.6 million per film, far in excess of that which the television networks currently spend for such project. The Stanford Report contains a more sophisticated, but equally sanguine prognosis:

> Broadcasting networks today can afford to pay about $800,000 for a good nonblockbuster film. . . . If a total of *60 million people* watch a two hour film

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[1] The Commission has also invited comments on the question of relaxing the series rule. *Second Further Notice of Proposed Rulemaking*, FCC 75-370 (released April 4, 1975).

[2] Stanford Research Institute, "The Outlook for Cable Television", Vol. 5, p. 43.

[3] The Subcommittee has recently initiated hearings on the subject of feature film contract exclusivity.

on broadcast TV in *two showings*, then 40 percent of the viewing audience is watching and advertisers will pay $1,800,000 to sponsor the show. *However, the same amount can be raised from 900,000 pay TV homes, which would happen as soon as there are 2,250,000 pay TV homes. This threshold level of a little over two million pay TV homes should be passed by 1977.* (p. 33).

Of equal significance, it should be noted that, even under present "oppressive" conditions, the fortunes of cable appear to be improving rapidly. At the recent annual meeting of Viacom International, Inc., for example, it was announced that the company's first quarter earnings were up 22%. (*CATV*, May 5, 1975, p. 8.) Similarly, American Television and Communications Corporation reported substantial increases in both revenues and earnings for the nine-month period ending March 31, 1975. (*Ibid.*) UA-Columbia Cablevision, Inc., in a recent letter to shareholders, stated that it was "pleased to report record results from our operations." TelePrompTer President Russell Karp has also stated recently that his company's revenues rose by 20% in the first quarter, to more than $23 million (*Broadcasting*, May 22, 1975, p. 58; *Television Digest*, May 19, 1975, p. 5). The optimistic outlook of these cable executives is also reflected in the dramatic escalation of CATV stock prices. A list of illustrative stocks is attached as Appendix A.

Perhaps the single most critical development, however, is the prospective use of satellite technology to facilitate CATV networking. In April, Home Box Office, Inc. announced plans to utilize the satellite facilities of RCA to interconnect pay cable operations. At a reported annual cost of $2 million, a program service of entertainment and sports will be provided to cable systems commencing this fall. (*Barron's*, May 19, 1975, p. 9).[4] Cable systems prepared to construct earth stations at a cost of $75,000 include UA–Columbia, American Television and Communications, Jones Intercable, and TelePrompTer. The satellite interconnection of TelePrompTer alone, involving the construction of twenty-four earth stations, will provide an additional 870,000 prospective pay cable subscribers to the CATV network. (*The New York Times*, May 30, 1975.) Attached as Appendix C is an article from *Broadcasting* which further details these developments.

The savings in distribution costs with satellite interconnection will be considerable. Paul Kagan thus includes a technical analysis of Robert E. Button (attached as Appendix D) which concludes that "the costs to the cable system operator for participation in such a network average out to approximately 10¢ per subscriber home or about 4¢ per potential viewer per month." (*How Pay TV Will Realize Its Promise*, April 28, 1975, p. 22).

The insignificant cost of pay cable conversion is summed up by Kagan:

> It is possible to set up pay-cable TV for as little as $15 per pay TV subscriber (using "notch-filters" to block out non-subscribers) or, more typically, $50 (using a scrambled-picture, set-top converter). Even padding the investment with labor charges, promotion costs, selling commissions and trial-and-error, *it is clear that the cable TV industry could saturate one in every three of its current homes at a total cost equal to just one year's worth of its internal cash flow.* (*Ibid.*, p. 11) [5]

ILLUSTRATIVE MARKET PRICE INCREASES OF PUBLICLY-TRADED CATV STOCKS

Company	1975 Low	June 2–19, 1975
American TV & Communications	5¾	17¾
Burnup & Sims	2⅞	5⅝
Cablecom General	1⅝	5⅜
Cable Funding	4¼	5¾
Communications Prop	1¼	2¾
Cox Cable	4⅜	16⅞
General Instruments	5	11⅜
Scientific-Atlanta	4½	15¾
Tele-Communications	¾	3⅝
TelePrompTer	1½	8⅞
UA-Columbia Cable	4⅝	12¼
United Cable	1¼	3¾
Viacom	2¾	9⅜
Vikoa	1¼	3¾

Source: Barron's, June 2, 1975.

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[4] The *Barron's* article is attached hereto as Appendix B.

[5] Kagan also notes: "All of our pay TV projections have been predicated on single-channel service and outlays per home of up to $10 per month. At some future point, perhaps by 1980, pay TV is likely to have a multi-channel capability able to stimulate greater consumer expenditures." (*Ibid.*, p. 13.)

[From Barron's, May 19, 1975]

HOME BOX OFFICE, INC.

PAY TELEVISION IS FINALLY MAKING THE SCENE

(By Margaret D. Pacey)

This October, if all goes well, pay television, which for over two decades has been long on promise and short on performance, will take a critical step toward emerging from its experimental, localized status. More specifically, using an RCA satellite, Time Inc.'s Home Box Office subsidiary, a network packager of entertainment and sports programming in the Northeast, will transmit movies and sports to UA-Columbia Cablevision operating in Florida. Subsequently, similar signals will be beamed to Southern California and the Midwest.

A national audience could be just the shot-in-the-arm Pay TV, an adjunct to cable television offering extra programming for a fee, needs to get off the ground. Thanks to the growth of cable TV systems around the country, the physical base for the business is now in place. And, as a matter of fact, even in its present form, serving only chosen localities, Pay TV, via cable, has been increasing the number of subscribers and improving the quality of its offerings.

EMBRYO STAGE

A national audience could enable the budding industry to become more aggressive in bidding for entertainment vehicles, which, in turn, presumably would further enlarge its subscription rolls. Right now, to be sure, the project is still in the embryo stage. The satellite has yet to go up, nor has the FCC okayed construction permits for the earth stations which will receive the signal. Worth noting, too, are the inevitable technological and programming bugs. More important, perhaps, before Pay TV can hit the big leagues, it must gain relaxation of FCC regulations, develop more sophisticated hardware, come up with the shows to attract big city customers and pick its way through a thicket of legal and union disputes.

Nonetheless, despite the recession, cable subscribers in growing numbers are plunking down $10 for installation and $6-to-$9 monthly for new programming. According to the National Cable Television Association, Pay TV, as it exists today, was launched in Wilkes-Barre and San Diego in late 1972. By the end of 1973, it boasted 16,000 customers.

In March 1974, the figure was up to 60,000 and by January 1975, it had more than doubled, to 130,000. On May 1, there were 187,000 subscribers in 16 States (100,000 in the Northeast). Paul Kagan, a consultant who closely follows the fortunes of the industry, estimates that more than two million homes could be hooked into Pay TV by 1980.

CUT IN COSTS

Sparking the growth has been stepped-up marketing efforts by the cable operators, advances in the transmission end and, not least, more attractive viewing fare. Moreover, the industry has settled on a monthly subscription price rather than individual program charges, which has brought a degree of uniformity to the field and simultaneously cut hardware costs. Thus, the willingness of a Home Box Office to shell out $2 million a year for satellite facilities is more of a natural evolution than a radical departure.

Since newcomers are flocking into the picture steadily, it's difficult to get a hard fix on the number of companies in Pay TV. The list, though, includes around a dozen publicly-held CATV concerns. Among them: another Time subsidiary, Manhattan Cable, UA-Columbia Cablevision, American Television & Communications, Viacom, Cox Cable, Warner Communications, TelePrompTer, Communications Properties and Optical Systems.

Scientific Atlanta is the leader in building Pay TV earth stations, an activity in which Collins Radio, a Rockwell subsidiary, also boasts a stake. Aforementioned Home Box Office is the No. 1 packager of pay network programming, with Optical Systems furnishing part of the competition.

To date, Pay TV had more impact in the stock market than on corporate earnings. For instance, sparked by the April satellite announcement, Time's stock climbed from 34¼ to a recent 1975 high of 53½, and is now at 51. Nor were buyers deterred by the fact that the publishing giant suffered a pretax

operating loss of $8.7 million on its cable and Pay TV operations last year and does not expect HBO to break even until 1977 or 1978.

Admittedly, the bull market helped, but the glamor of a new industry probably played a bigger role in the revival of interest in the long dormant cable TV group. Tele-PrompTer, the nation's largest cable and Pay-TV operator, lost 44 cents a share last year and 11 cents in the first quarter of this year, but its stock has climbed from a low earlier this year of 1½ to as high as 6⅞; it now sells around 6½. American Television & Communications, UA-Columbia, Warner Communications and Viacom are just nearing the break-even point in Pay TV. But their respective equities have shot up from 6¼ to 16, 4¼ to 11⅜, 8¼ to 16 and 2¼ to 8.

OUT OF THE PAST

What has set the speculative juices flowing is the prospect that Pay TV will represent some icing on the over-done cake of cable television. And, according to Tele-PrompTer President Russell Karp, pay television is the only thing that will make the company's New York and Los Angeles cable operations profitable (the two lost around $6 million in 1974).

Once the heavy cost of laying a cable has been met, the addition of Pay TV facilties represents a relatively minor investment for the operator. For example, Cox Cable paid $5.5 million to build its cable in San Diego, but had to cough up only another $100,000 to enter the Pay TV field in that city. However, while Pay TV calls for modest outlays (earth stations and tape videocassette equipment run around $75,000, while filters and "little black boxes" can range from $10 to $70 per home) many of the cable companies remain burdened by past financial sins via high interest charges and ungainly balance sheets. Optical Systems, for one, was forced to withdraw a $4 million issue early this year due to a lack of buyers: its 1974 10K points out that the company is attempting to revamp its capital and debt structure.

Additionally, while proponents wax eloquent about the day five years hence when Pay TV will be a major medium offering the best cultural programs, sports events like the Indianapolis 500 and specials like Woodstock, the industry may not enter the promised land this decade. One huge roadblock is that the big payoff is in the big cities—and they've been hard to crack because of fierce competition from the other entertainment outlets. For instance, Time's subsidiary, Manhattan Cable, in business since 1966, has signed up only 65,000 cable customers (a large number of whom live in blacked-out acres and thus are unable to obtain any type of television without cable). Only 12,000 of these currently buy Pay TV.

Both movie producers and cultural centers wish the new industry well. Twentieth Century Fox, for one, grossed $600,000 from Pay TV for several films last year. Which may not compare to the sums networks pay—an average of $800,000 per movie (and $10 million for The Godfather)—but it's not bad for openers.

WHAT PRICE CULTURE?

John Goberman of New York's Lincoln Center states: "Pay Television is important for our future." What's more, he feels cultural programing could be used by Pay TV to attract new subscribers. But, he adds, the stakes must be raised—"30 cents a subscriber for 100,000 subscribers is not the answer."

In the view of the industry, Washington is a major roadblock. The industry insists the FCC is over-protecting the television networks. To counterattack, several companies have filed suit claiming that the Commission has no jurisdiction over its programming and is violating the First Amendment.

What the industry wants is a four-year moratorium on regulation to permit it to develop. Viacom President Ralph Baruch explains: "If the consumer wants it and will pay, we have an industry. If not, we don't and will go away. But let us have a chance."

At the moment, Pay TV is hedged in by a variety of restrictions. For instance, it can carry movies less than three years old and those more than 10, but not broadcast locally within the past three years. Since the networks can obtain exclusive rights to a film, the new medium can be barred from showing a movie within a few months of its release. Additionally, the broadcasters can warehouse popular movies by playing them once every two years and 11 months.

FEE-VEE

Despite such drags, companies which are showing profits on their CATV operations and which enjoy some expertise in the new business, find it relatively

easy to turn a profit. Thus, in the first six months of its fiscal year, UA-Columbia earned 33 cents a share, including a couple of cents from Pay TV. The concern averaged 7,500 Pay TV subscribers during the stretch (3,060 on October 1 and 8,000 at the end of March).

Most cable operators expect to ring up fairly substantial earnings in two or three years by attracting at least a third of their customers to Pay TV. In striving to do so, the companies are using various kinds of merchandising bait. To illustrate, in Mid-April, all 14,349 cable subscribers in San Angelo received pay programming free for three weeks; those that did not ante up the $$ monthly charge in that period were then filtered out (UA-Columbia used a $$ filter to trap the signal at the telephone pole rather than the usual black box which is in the home). By early May, roughly 3,500 signed up.

Taking a different (and less successful) look, Communications Properties offered the Philadelphia Flyers home hockey games to Philadelphians who paid $100 in advance. The playoffs were made available for another $52 in advance. After losing $25,000, the company decided to switch to a tamper-free little black box next year, expand the schedule and require fewer dollars up front.

To keep out the free loaders, Tele-Communications and Viacom, as well as Communications, are strong advocates of fool-proof hardware, having discovered a good technician can pull out an unscrambled signal without paying for it. Tele-Communications learned its lesson when college students published instructions on how to tap a Pay-TV system in a Cincinnati newspaper.

NEAT PACKAGE

As noted, HBO is the leading packager of network programming. Of the minimum $5 monthly charge, HBO receives $3.50. It pays from its share $2.10 to $2.40 for movies, sports, et al. Half of anything over $6 goes to HBO. The $2.50 goes to the cable operator. However, since the same movies and sports events are usually made available to all Pay-TV companies at the same time, concerns can do their own programming (as Warner does in its larger systems) or go to other packagers.

The industry has increasingly shifted from using video cassette tapes to microwave because of cost savings. Cassette equipment usually runs about $75,000 and the cable operator (or packager) must also pay for a studio and maintenance employes. Microwave, monthly charges for which start at $1,000, obviates the need for such expenditures, but there is little of it available. Its prime use at present is in the Northeast.

With the satellite, the cable operator must build a $75,000 earth station to receive the picture but is free of further studio expenses. In addition, satellite will bypass mountains and high buildings with no signal breakage. However, cassettes probably will continue to be used in markets of less than 10,000 and microwave where it is already in place.

Some concerns will use all three. UA, the first to announce a tie-up with Time's satellite, uses cassette tapes in San Angelo, microwave on Long Island and will go to satellite in Fort Pierce, Fla., on October 1. By the spring of '76 the company expects to be operating earth stations in El Centro, Calif., Kennewick, Wash., Yuma, Ariz., Laredo, Texas and Fort Smith, Ark. American Television & Communications, which until now has only leased a pay channel, has blueprinted an earth station near Orlando, Fla., for late fall.

THE RUSH IS ON

Not everybody is in a rush to join the Pay-TV satellite bandwagon. Viacom President Baruch, for one, is content to let "others do the pioneering." But one way or another all are expanding. Cox Cable will in September launch operations in Macon and Saginaw. Communications plans to start four new systems by August 1. TelePrompTer will begin in Manhattan this year (Time Inc. already is providing Pay TV to its subscribers there) and is working on plans to offer pay cable "to a substantial additional number of basic cable subscribers."

The field, as noted, is beginning to attract a crowd. Tele-Communications plans to enter San Francisco shortly, while Comcast Corp. expects to be in Philadelphia within 12 months. Vikoa hopes to conclude an agreement by the end of the year. The industry's aim is to attract customers for cable as well as Pay TV operations. New channels promise to add quickly to gross. TelePrompTer figures on revenues of $3 million this year from its 33,630 pay subscribers.

But these figures are piddling to industry expectations: $6 to $9 a month (or roughly half after expenses) hardly rates as lavish living. More important to fu-

ture revenues and earnings will be the higher prices which can be obtained from additional channels, and then a move to either a dual system of monthly subscription and per program. Eventually, the payoff should come from operators charging for each individual show. While this change would require heavy merchandising and advertising, numerous packagers and suppliers seem eager to enter the field and take on that job.

Explains American Television & Communications President M. M. Rifkin: "A hit picture should be paid for. Within five years we will be on a per program basis and might have something like the original Beatles giving a four hour concert, or a super duper music festival like Woodstock. People in Arkansas couldn't go to Woodstock and with the price of Broadway musicals at $12–$15 the economics are fantastic."

[From Broadcasting, June 2, 1975]

Pay Cable's Horizons Expand Even Farther

This time it's an agreement between HBO and Teleprompter for regional service this summer, but with plans for eventual national feeds via satellite

Portending giant strides for pay-cable television, Teleprompter Corp., and Home Box Office Inc. last Thursday (May 29) announced an agreement in principle for HBO to supply about 800,000 cable subscribers nationally with pay-cable programing.

Telepromoter, the nation's largest cable TV operator with 141 systems and 1,060,000 subscribers, said the proposed agreement covers 81 systems in 21 states. The first service under this agreement will begin in the summer of 1975 to Teleprompter systems in northern Manhattan; the four New Jersey systems of Ventnor, Ocean City, Vineland and Wildwood, and in Danbury, Conn., and Elmira and Jamestown, N.Y.

Initially, these systems will be served by HBO's current terrestrial microwave system but the agreement contemplates that, for the most part, pay programing will be transmitted to Teleprompter's cable system via satellite. Gerald M. Levin, president of HBO, New York, said his company is proceeding with plans to launch domestic satellite service this fall, as announced last April (Broadcasting, April 14). Russell Karp, president of Teleprompter, said preliminary studies show that 24 earth stations will be required to serve the systems expected to receive the HBO network service.

He noted that during the past year, four Teleprompter systems with 76,000 subscribers have been offering pay cable to subscribers and said a total of 870,000 would have such service when the new HBO facility is fully operative. Mr. Karp added that other Teleprompter systems may be added as the progress of pay cable is further evaluated.

Both parties expect to sign a definitive agreement within the next few weeks. Mr. Karp said the service probably would be implemented nationally sometime in 1976, subject to receiving FCC approvals.

HBO, which is owned by Time Inc., supplies about 70 hours a week of current motion pictures, live sports and special interest programs, all without commercials. It has 120,000 subscribers on more than 50 systems, including three owned by Teleprompter. (The other Teleprompter system in Los Angeles is programing its pay service independently). Monthly charges for the HBO service are set by the system and range from $6 to $9 monthly.

The first cable MSO (multiple system operator) to sign on for HBO's satellite service was UA-Columbia Cablevision, which plans earth stations in seven markets from the Northeast to the Northwest. The application for its first—in Fort Pierce, Fla.—is pending at the FCC. It hopes to have that system operational by Oct. 1 this year.

The second to sign was American Television and Communications, which plans an earth station in Orlando, Fla., to serve several of its systems in that state.

Jack Kent Cooke, chairman of Teleprompter said that at the four systems with pay cable, more than 44% of subscribers are taking the service.

Mr. Karp said Teleprompter expects the new pay service to make "a significant contribution" to its revenues and income. The company has been making a comeback from drastic financial losses in 1973 through a program of cost-cutting and by increasing rates and subscriptions. It has added more than 100,000 connections since January 1974.

Teleprompter's stock, which plunged to 1¼ last December, last week was being traded on the New York Stock Exchange at 7⅞. Mr. Karp attributed the rise not to reports of a possible HBO agreement but to the company's improving financial picture.

During the New Orleans convention of the National Cable Television Association this spring—at which HBO's satellite pay TV plans were the headline event (BROADCASTING, April 21)—Teleprompter's Mr. Karp participated in a panel session that concluded there might be a million pay cable subscribers within the next two years. His company's action last week may go a long way toward fulfilling that prophecy.

[From the Paul Kagan Newsletter, Apr. 28, 1975]

(By Robert E. Button, NCTA Convention, Chicago, Ill., April 1974)

"The first generation domestic satellite facility that seems to be emerging in 1974–75 consists of a carrier-owned and operated satellite assessed thru carrier-owned and operated transmit and receive stations . . .

"Cable interface with these facilities would occur at receive-only earth stations located at or near system head-ends. It has been estimated that for the immediate future between 80 and 100 earth stations in combination with regional terrestrial microwave systems could interconnect cable systems serving 50% of the present CATV market...

"Cable's immediate need is for distribution of special interest programming which in turn requires the economic characteristics of satellite distribution . . .

"The audience for this type of programming will become a viable market through the cumulative process, or incremental build-up of small audience segments.

"Whether these segments are reached in larger population centers or in rural areas, the satellite sees them all at a uniform, one-time space cost. Indeed, the satellite alone makes attainable the concept of a large national cumulative audience for special interest program material . . .

"For a point-to-many-points service, the expected CATV pattern of usage . . . no charge at all is made for reception at cable-owned receive-only stations, regardless of number.

"Thus the carrier charge for satellite service, including transmission, could be subdivided by as many receive-only stations as would be in operation, a number eventually in the thousands, for the cable industry alone.

"The cost of reaching cable subscribers in this way with marketable special interest programs begins to shrink to manageable proportions.

"A reasonable estimate for the near future would suggest that a cable-satellite network would be constructed wherein strategic placement of 80 earth stations in combination with existing terrestrial facilities would serve cable systems reaching some 4.5 million subscriber homes.

"Satellite transmission, or up-link plus space segment costs would be about $1.2 million per year for full-time usage of one transponder. (Ed. note: this figure has since dropped to $750000 and may soon decline further.) . . . The earth stations themselves are estimated to cost $70,000 each, but this amortizes over at least a 10-year life and involves low operating costs.

"With these figures to build on, and including on-going distribution costs from the 80 earth stations, the costs to the cable system operator for participation in such a network average out to approximately 10¢ per subscriber home or about 4¢ per potential viewer per month.

"As soon as it is clearly recognized that an operational entity, having a specific operational mission for the industry, in contrast with the general responsibilities of a trade association, is a feasible organization, the cable industry will be in a position to deal from strength in the various readjustments that are now impending.

"Such an entity, foreshadowed in events that have been mentioned, would owe its cohesion to the glue that holds our form of society together: the profit-motive.

"For the prospects of a multi-service national broadband communications network for this country are real, and differ, in an order of magnitude, from the limited structure of today.

"It remains for those who see these prospects to bring them to fruition."

STATEMENT OF LESTER W. LINDOW, EXECUTIVE DIRECTOR, ASSOCIATION OF MAXIMUM SERVICE TELECASTERS

The Association of Maximum Service Telecasters (MST) is a non-profit, trade association made up of a broad cross section of television broadcast sta-

tions. All television stations operating at the maximum power authorized by the rules of the Federal Communications Commission (FCC) are eligible for MST membership, except that the owned and operated stations of the three major national networks and the networks themselves are neither MST members nor eligible for MST membership. Because of MST's concern with maintaining and improving the free over-the-air television broadcast service available to the American public, it has participated in numerous proceedings before the FCC and has testified before committees of the Congress from time to time on matters relating to cable television or "CATV."

MST supports the adoption of fair and equitable copyright legislation dealing with CATV, but believes that H.R. 2223 in its present form is inconsistent with that objective. Accordingly, MST opposes adoption of H.R. 2223 in the absence of major changes in the bill.

I. *Compulsory Copyright License For CATV Would Perpetuate CATV's Unfair Competitive Advantage Over Broadcasting*

The essence of copyright, like any other property right, is the ability to control use and distribution. Just as the owner of a commercial building may use the building himself, lease it to one or more others on a short or long-term basis, sell it, or not use the building at all, copyright gives the owner of a television program the ability to control who will have the right to use the program and on what terms. Thus, MST members and all broadcasters must bargain and usually pay for each program which they wish to use.

The bargaining process is one of competitive give and take in which broadcasters bid against each other for the rights to use programs over given periods of time. The program fees paid by television broadcasters are typically expressed in specific dollar amounts, not a percentage of gross receipts, so that stations assume a substantial risk that the fees they pay for a particular program will not be recouped through advertising revenue. Television stations pay quite substantial fees; FCC figures show that the expenses of a typical station for non-network program material amount to 34 percent of the station's total revenue.

CATV to date has escaped all copyright liability, which is to say it both has been exempted from the process of having to bargain for the right to use programs and has paid nothing for its use of programs. This is a highly anomalous situation. CATV is frequently described as a competitive, new, independent medium of communication. Yet CATV enjoys the enormous competitive advantage over broadcasting of not having to bargain for the right to use programs and of paying nothing for the programs it uses for its own profit-making purposes.

This competitive disparity could only be eliminated by subjecting CATV to the same type of copyright liability to which television broadcasters have always been subject: Normal copyright liability in which there is an infringement unless the user bargains for and obtains an authorization to use the particular program in question. Section 111 of H.R. 2223, however, would not impose normal copyright liability. Instead, it would insulate CATV from having to bargain for the right to use programs by giving CATV a "compulsory license" for the retransmission of broadcast signals.

The competitive disparity which a compulsory license would perpetuate is very great indeed. Suppose one of two television broadcast stations in the same community was subject to normal copyright liability while the other had a compulsory license such as that which Section 111 would give to CATV. The first station would have to bargain for each program which it used, and would undoubtedly end up paying very substantial sums for such uses just as is true of all television stations operating today. The other station, however, upon payment of only a nominal percentage of its gross revenue, could pick and choose from all popular television programs, including the very programs which the first station had paid substantial sums for the right to use. Even if CATV had to pay a relatively high percentage of its gross revenues for a compulsory license, 20 percent for example, it still would enjoy an enormous and unfair advantage of not having to bargain for the right to use programs. The situation would be analogous to that of two retail merchants, one of whom must bargain for and acquire goods at substantial prices before he can sell them while the other may simply take goods from anyone and sell them as his own upon payment of a small percentage of his gross receipts.

II. *Nevertheless, Pursuant to Its Past Commitment To Do So, MST Would Support Copyright Legislation That Contained a Limited Compulsory License*

In November, 1971 MST, the National Association of Broadcasters (NAB), the National Cable Television Association (NCTA) and a committee of the major program suppliers were urged by the Office of Telecommunications Policy (OTP) and the FCC to compromise their differences over certain CATV copyright and regulatory issues by accepting a proposed "consensus agreement." Each of these parties agreed to do so, although only with great reluctance in the case of MST. On copyright, the consensus calls for a compulsory license for CATV which is limited to retransmission of (1) "local" broadcast signals (as defined by the FCC's rules), (2) "grandfathered" signals (*i.e.*, those that systems already in existence at that time were carrying) and (3) such distant signal programing as was contemplated by and would be consistent with the regulations proposed at that time relating to CATV retransmission of distant signals.[1] The consensus further calls for normal copyright liability for any CATV retransmission of broadcast signals not falling within these categories.

In its present form, Section 111's compulsory license is completely open-ended. It provides for a compulsory license for any broadcast signals which CATV systems are now authorized or may be hereafter authorized for carriage by the FCC. Thus, Section 111 would delegate the authority to create or destroy property rights to a bare majority (four or even fewer members) of the FCC. MST does not believe that such an open-ended authority over the copyright law and hence over property rights should be delegated to the Federal Communications Commission and that in any even, such an open-ended compulsory license is inconsistent with the legislation which the FCC, the OTP, and the principal representatives of the most immediately affected industries all committed themselves to accept by way of the consensus agreement.

III. *The Fees for the Compulsory License Ought To Be Established in Accordance With the Provisions of the Consensus Agreement*

The consensus agreement calls for the amount of the fees to be paid for the compulsory license to be established through compulsory arbitration if the parties are unable to agree upon an appropriate fee schedule. The parties have not been successful in negotiating a fee schedule and accordingly compulsory arbitration appears to be an appropriate solution. The consensus also calls for an exemption from the fee requirement for independently owned CATV systems with fewer than 3,500 subscribers, and MST would support legislation containing such an exemption from the fee requirement.[2]

The consensus does not call for but some have argued that CATV systems should be exempt from any payment pursuant to the compulsory license for the retransmitting of "local" broadcast signals. The claim is made that since the broadcaster has paid for the right to distribute the program locally, a CATV should not have to pay again, especially since CATV is only enhancing the broad caster's ability to attract an audience in the broadcaster's local market. This is a highly theoretical argument. For one thing, few if any CATV systems exploit only those broadcast signals which are readily available off the air. For another, this contention assumes that broadcasters and their program suppliers need and want the "benefit" that CATV is supposedly providing. The only appropriate way to test these theoretical contentions would be to impose normal copyright liability on all retransmission of broadcast signals by CATV systems. If indeed a CATV system was able to persuade a local broadcaster and its program suppliers that it was simply going to "help" the station by carrying its signals, the CATV might receive a copyright permission just as translator or "repeater" stations can and do receive authorizations to use programs without the payment of any fee even though the translator is subject to normal copyright liability.

However, CATV interests have not expressed any desire or inclination to accept a marketplace resolution of their claims regarding "local" signals. Rather, they desire a compulsory license for both local and at least some distant stations in order to protect and insulate them from the bargaining process

[1] These regulatory proposals were adopted by the FCC in early 1972. They permit unlimited carriage of distant broadcast signals in communities more than 35 miles from the center city or cities of a television market. Generally at least two distant independent stations and in some cases more distant signals are permitted within the 35-mile circles subject to some exclusivity requirements.

[2] A system with 3,500 subscribers charging $6.50 per month (a fairly typical rate at the present time) would have gross annual revenues of $273,000.

which is dictated by normal copyright liability. MST believes that CATV cannot have it both ways. If CATV is unwilling to take its chances in the marketplace with normal copyright liability, it cannot complain that it might have been able to strike a somewhat better bargain for local signals if it had been willing to accept the risks of normal copyright liability.

IV. *Copyright Liability for CATV Will Not Justify Eliminating or Reducing FCC Regulation of CATV Carriage of Broadcast Signals*

In 1966 the FCC cited two independent concerns in support of its assertion of jurisdiction over CATV carriage of broadcast signals.

First, the FCC noted that by importing the signals of broadcast stations not readily available off the air, CATV systems were likely to cause substantial audience losses for local stations. This in turn would reduce the revenues of local stations, forcing them to reduce the quality of their service to the public and even forcing many local stations off the air or at least making it impossible for new local stations to commence operations. Such a development would be contrary to the public interest. Many persons, particularly the economically disadvantaged who cannot afford CATV and those living in areas with a population density too low to support CATV operations, would end up with reduced television service or no television service at all. Even CATV subscribers would suffer a diminution in locally oriented news and public affairs from local stations while the distant stations imported by CATV could not be expected to provide locally oriented service for the CATV community. This has sometimes been called the "economic impact" basis for FCC regulation of CATV carriage of broadcast signals.

Second, the FCC noted that due to the anomalous copyright situation, CATV, unlike any other development which might adversely affect the quality or quantity of local free television broadcast service, enjoyed the unique and unfair competitive advantage over broadcasting of not having to bargain or pay for the programs it was using. This is the so-called "unfair competition" basis for FCC regulation.

Even if CATV was subject to full or normal copyright liability, it would not in any way obviate the need for regulation designed to insure that CATV would not impair or destroy local free broadcast television on which large segments of the population are dependent for television service. Congress long ago decided that the nation would be better served by many local television broadcast stations rather than simply a few "super stations"—that, for example, Madison, Wisconsin should have its own local stations rather than simply being served by Chicago or New York stations that would not serve local needs or interests in Madison. Thus, allowing CATV to impair local broadcast service by importing a relative handful of stations from the very largest cities—by importing Chicago and New York signals into Madison, for example—would not be in the public interest even if this was done with the consent of the Chicago and New York stations and their program suppliers.

In any event, a compulsory copyright license for CATV, even one which applies only to a limited number of distant stations, does not detract from the unfair competition basis for FCC regulation of broadcast signal carriage. Even though it may mean some monetary compensation for program suppliers, a compulsory license insulates CATV from the bargaining process and thereby assures CATV of a competitive advantage over the broadcaster who must participate in that bargaining process.

For these reasons, MST believes that any suggestion for the addition of a regulatory provision to H.R. 2223 or "legislative history" which would direct or encourage the FCC to weaken or eliminate its regulation of CATV carriage of broadcast signals should be rejected out of hand.

V. *The FCC's CATV Exclusivity Regulations Should Not Be Eliminated Or Weakened If CATV Is Given A Compulsory Copyright License*

In addition, for the reasons given above, there is a further reason for rejecting any suggestions that the FCC's exclusivity regulations should be eliminated or weakened with the adoption of H.R. 2223 or any other copyright bill containing a compulsory license for CATV.

The value of a program to a broadcaster, and thus the broadcaster's willingness and ability to pay for the right to use the program, depend very heavily on the broadcaster's ability to acquire exclusive television rights in his local market during the term of his use of the program. Without exclusivity, the promotion which is essential to attract and build audiences for most programs can be ren-

dered useless or even counter-productive. Also, without exclusivity it becomes difficult if not impossible to predict in advance how large an audience is likely to watch a particular program since other television exposure of the program which will reduce the audience is highly unpredictable. The inability to predict expected audiences is a most serious matter since advertising is sold and offered for sale well in advance of the local station's broadcast, and if there is no reasonable basis for expecting an audience of a particular size, adequate advertising support will be difficult if not impossible to obtain.

In recognition of the vital importance of exclusivity, prior copyright bills, with the exception of S. 1361 as passed by the Senate last year, have contained exceptions to the compulsory license for CATV that expressly contemplated broadcaster exclusivity in certain circumstances. These exceptions to the compulsory license, which have sometimes been inaccurately referred to as "regulatory" provisions, were omitted from S. 1361 because, and only because, the FCC had adopted expanded exclusivity regulations pursuant to the consensus agreement and pursuant to the consensus it was deemed desirable to leave the scope of appropriate exclusivity to FCC regulation rather than incorporate such requirements in the copyright bill. There is nothing in the Senate's action or in the consensus agreement, however, which could possibly justify a pre-emption of FCC authority to adopt and enforce exclusivity requirements. Throughout the long period in which copyright legislation has been pending before the Congress, there has never been a serious proposal that a compulsory license for CATV should override and preclude all opportunities for broadcasters to acquire reasonable exclusivity with respect to CATV retransmission of non-local signals. MST believes that any legislation which would preclude such reasonable exclusivity would seriously jeopardize the very survival of free television in many areas of the country and should be rejected.

Statement of William J. Bresnan, President, Cable Division, Teleprompter Corp.

Mr. Chairman, on June 11, 1975, I was privileged to appear before your Subcommittee on Courts, Civil Liberties and the Administration of Justice to present Teleprompter Corporation's views on certain provisions of H.R. 2223. With your permission I should like to supplement my original testimony for the record by means of this letter.

As you know, it is Teleprompter's position that no copyright royalties should be payable by cable television systems because of their reception and retransmission of broadcast signals of copyrighted material. In carrying such material cable systems are not "performers" but merely providers of reception services to subscribers. These services result in enlarging the broadcaster's audience and the advertiser's market.

A broadcaster with an enlarged market is able to charge his advertisers more, and so is able to pay more than he otherwise would to the copyright owners of the material retransmitted. This has long been recognized in the case of a cable system which transmits local broadcast signals and it is similarly true in the case of a cable system which retransmits distant broadcast signals. Each of the cable system's subscribers is included in the rate base of the distant originating broadcast station and so the advertising rate charged by that station—and the amounts potentially payable by that station to the suppliers of copyrighted material—are increased accordingly.

Broadcasters are very aware of the expanded coverage given them by cable television stations and emphasize this fact when soliciting potential advertisers.[1] It is our position, therefore, that copyright owners are properly and adequately compensated by the broadcaster when the copyrighted material is retransmitted by the cable system.

Shortly after my appearance before the Subcommittee this position was recognized and confirmed by the United States Supreme Court. In *Twentieth Century Music Corporation v. Aiken*, 43 U.S.L.W. 4799 (June 13, 1975), involving the question of whether copyright liability should attach to a person who, by the use of multiple speakers, made radio programming available throughout a fast-food shop, the Court stated:

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[1] That this expanded coverage benefits the broadcaster is graphically illustrated by an agreement in principle which Teleprompter has recently reached with an independent television station. Under this agreement in principle the independent station is to contribute $35,000 as partial reimbursement of the costs incurred by Teleprompter in connecting the broadcaster to Teleprompter's cable systems in distant markets. We expect that the final documentation for this agreement will be completed in the next week or two.

"The petitioners have not demonstrated that they cannot receive from a broadcaster adequate royalties based upon the total size of the broadcaster's audience. On the contrary, respondent points out that generally copyright holders can and do receive royalties in proportion to advertising revenues reflecting the total number of the listeners, including those who listen to the broadcast in public building establishments." [2]

Two Supreme Court decisions have declared cable systems free from copyright liability in retransmissions.[3] The Court held cable systems were not broadcasting or performing the copyrighted works and so were not subject to copyright liability. The reception and rechanneling of distant as well as local signals was held to be a viewer function. This was so irrespective of the distance between the broadcasting station and the ultimate viewer.

Neither public policy nor the economic facts warrants a change in the law. The purposes and goals of national copyright policy—to encourage and reward creativity—cannot be properly served by any method of royalty payments for retransmissions which are assessed ultimately and discriminatorily against the subscribers of cable systems.

We further believe that copyright owners are not injured by cable system retransmissions—of local or distant—signals. Copyright owners have never claimed that cable's retransmission of local signals injures them at all. They have contended, however, that when cable imports a copyrighted program into a distant market the ability of the copyright owner to sell his program in that market is impaired. But the copyright owners have never to our knowledge produced any evidence to support this proposition, even though such evidence, if it existed, would be readily available to them. Moreover, such evidence as we have supports an opposite conclusion.

In order to assess the impact of distant signal importation, Teleprompter conducted a detailed study of all signals imported by our 135 cable systems.[4] This study shows that distant signals imported by cable television generally have such a minimal penetration in the imported market that they could not possibly have a significant negative impact on the copyright owner.

Teleprompter's cable system at December 31, 1973, carried a total of 1,286 television signals. Of these 1,085 signals were required to be carried by the FCC's rules—primarily either because the particular cable system's head end is within 35 miles of the television station or because the station is "significantly viewed" in the county where the cable system operates.

Thus only 201 signals (15.6% of all signals carried by Teleprompter systems) qualify as imported distant signals.[5]

Teleprompter has analyzed the market share of these 201 imported distant signals and the results are striking. These results are summarized below:

Market share	Number of signals	Number of signals with this market share as a percent of all imported signals	Number of viewing homes [1]	Number o viewing homes as a percent of total teleprompter subscribers (1,070,000)
0 to 5 percent	156	78	16,757	1½
5 to 10 percent	27	13	10,626	1
10 to 15 percent	10	5	4,422	½
15 to 20 percent	6	3	2,590	.2
More than 20 percent	2	1	2,111	.2

[1] The term "Viewing homes" refers to those homes which view the station in question during an average quarter hour.

[2] See also *Teleprompter Corporation v. Columbia Broadcasting System,* 415 U.S. 394 (1974), where the Court stated:

"From the point of view of the copyright holders, such market changes [i.e., those brought about by the cable television industry] will mean that the compensation broadcasters will be willing to pay for use of a copyrighted product will be based on the size of the direct market augmented by the size of the CATV market."

[3] *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corporation v. Columbia Broadcasting System, op. cit.*

[4] Teleprompter's systems range from the very small to the very large and are located in all sorts of markets. We believe that our systems are typical of the industry as a whole.

[5] For purposes of this computation a signal is counted each time it is imported into a different county. Thus if the same signal is imported into two different counties, it is counted twice.

As can be seen, 78% of the imported signals have less than a 5% market share in the counties into which they are imported and 91% have less than a 10% market share in such counties. A less than 5% penetration is clearly *de minimis* and a less than 10% market share is probably so.

Only 18% imported signals (9% of all imported signals) had a market share of more than 10% in the counties into which they were imported. The total number of viewing homes in the distant markets represented by these signals is 9,123—or less than 1% of Teleprompter's total subscribers.

Even the 1% figure overstates the copyright owners' case. Of the 18 imported signals which have a more than 10% share of the market, 15 are network affiliates. Copyright owners who sell to networks expect that their programs will be shown simultaneously throughout the country and do not desire to deny the programs to selected small markets. It is therefore improper to include those viewers who watch imported network affiliates in our analysis of the impact of cable importation of distant signals.[6] Rather we should look at only the number of viewing homes attributable to independent imported stations which receive a more than 10% share of the market. This number is only 1,076—or only 1/10 of 1% of Teleprompter's total subscribers.

Yet, because of a possibility that 1/10 of 1%—or even 1%—of Teleprompter's total subscribers may previously have seen a particular program,[7] H.R. 2223 would impose copyright fees of approximately $1,500,000 based on Teleprompter's 1975 revenues. Had such a fee been applicable in the first half of 1975, Teleprompter's loss would have been increased by 25%. (In the future, the comparison could be even more shocking because the royalty tribunal contemplated by H.R. 2223 could increase the amount of the copyright fee.[8])

The above analysis demonstrates that importation of distant signals by cable systems cannot have a negative impact on the copyright holder. The analysis does not show that such importation is irrelevant to the copyright owner, however. As I stated in my initial remarks to the Subcommittee, cable importation of distant signals often has a substantial positive impact on the copyright owner. The paradox is explained in the following example.

Imagine a television signal which is imported into 13 different markets of equal size in each of which it gets a 4% share of the market. This 4% share will have no effect at all on the copyright owner's ability to sell his product in any one of these markets. Yet the *cumulative* impact on the importation into all 13 markets is to give the originating station a bonus of a very significant number of additional viewing homes.[9] The positive effect of this on the originating station (and indirectly on the copyright owner) will thus be substantial.[10]

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[6] Actually one should exclude only the network programming of network affiliates and not the affiliates themselves. However, the number of viewing homes attributable to the non-network programming of network affiliates is so small that it may be properly disregarded.

[7] Moreover in many cases the FCC syndicated program exclusivity rules already give the copyright owners the ability to prevent this from occurring. These rules are designed to insulate television markets from signals imported by cable systems in order to better preserve these markets for the copyright owner. Under these rules, if a proper request for exclusivity is received by the cable system, systems in the top 50 markets are required to delete programs on imported signals if such programs were first licensed as a syndicated program less than one year before and systems in the top 100 markets are generally required to delete programming on an imported signal if the same programming is being broadcast contemporaneously locally.

[8] The Copyright Royalty Tribunal would be set up to function as the regulatory body to fix the royalty rates to be paid by cable systems. Wholly aside from whether this body, which would be established in the Copyright Office in the Library of Congress, is the proper regulatory one, the legislation establishes no procedures for its operation, no standards to use in fixing rates, and no judicial review except for fraud, corruption or misconduct. The constitutionality of such a sweeping delegation of authority without standards, is open to serious question.

[9] Thus, if there were 250,000 homes in each of the distant markets the total additional audience available to the originating station as a result of cable coverage would be 130,000 homes (250,000 homes $\times$ .04 $\times$ 13).

[10] Teleprompter does not contend that viewers in distant markets are always as valuable to the originating station as local viewers, only (as indicated by the television stations' own promotional material) that viewers in distant markets are always of significant value to the originating station. It is not necessary to attempt to calibrate the value to the originating station (and therefore, to the copyright owner) of a viewer in a distant market with exact precision, however. This is because, as shown in the analysis above, it is clear that there can be no significant negative effect on copyright owners from the importation by cable of distant broadcast signals. Thus, whatever benefit the copyright owner gets from expanded coverage in distant markets is a net benefit because there is no offsetting detriment.

Let us examine a very relevant and persuasive parallel. Most of the programing of network affiliates comes from the networks. Yet the network affiliate does not pay the network or the copyright owner for this programing carried on its broadcast channel.[11] Quite to the contrary, last year the networks paid these affiliates $243,600,000—almost a quarter of a billion dollars. These payments are made because the network affiliates enlarge the audience available to the networks and thus enable the networks to offer advertisers a greater audience for their commercials. Cable systems perform exactly the same function of broadcasters and copyright owners—but so far (except in the case mentioned on page 2 of this letter) without compensation from advertisers or broadcasters.

Thus, it is really beside the point to claim—as the copyright owners and broadcasters constantly do—that cable-television enjoys a unique and unjust exemption from copyright liability. As a special carrier of broadcast communications the industry is no diffrent in respect to its earnings than are the telephone companies, antenna and receiver manufacturers, and the host of other related businesses which can attribute some portion of their earnings to the fact that their service or product is involved in the transmission of copyrighted materials from broadcaster to viewer.

Cable television is a new industry which promises great public service. It should not be crippled in its youth because of superficially persuasive arguments that royalty-free cable retransmission, from which service cable systems derive substantial portions of their revenue, is inimical to national copyright policy. It is not, and the pressure to impose copyright liability for such cable activities is not based on sound copyright principles, but on the fears of a few but large program production companies and the cable industry's competitors.[12] We must not let these fears influence public policy in a way which will directly discriminate against cable subscribers [13] and indirectly injure the public interest generally by blunting the growth and development of the cable television industry. No system of legislated copyright liability, licensing and arbitrary royalty fees can possibly do as much to further the goals and purposes of national copyright policy as will the adoption of reasonable public policies that free cable television to achieve its potential of public service.[14]

The changes respecting cable television proposed by H.R. 2223 are unnecessary, unfair and discriminatory. Copyright owners are presently adequately compensated for material retransmitted by cable systems. FCC regulation can accommodate any proper broadcaster interests which may be harmed by cable system operations. We respectfully urge that the royalty obligation contained in Section 111 of H.R. 2223 and all related references to it in other provisions of the bill be deleted.

Statement of Times Mirror

It is a fact—whose supporting data are presented later—that CATV is materially benefiting many broadcasters and program owners through the enlarged audience it provides. Broadcasters either are (or could be) charging for this enlargement, and program owners could (or should be) negotiating on the basis of it. In brief, CATV is presently an economic "plus" for the TV industry,

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[11] Broadcasters may claim that in fact the network affiliate does give up something in exchange for this money—namely its ability to sell its broadcast time directly to advertisers itself or to another network. But this is no different from a cable station which imports distant signals. The cable system is not obligated to carry any particular distant signal; indeed it is not even obligated to carry any distant signals. Yet in many cases cable systems have transformed independent television stations into what amounts to regional networks—to the great benefit of these stations and the copyright owners who deal with them.

[12] The broadcast industry has for the last twenty years been seeking to limit cable's growth and profitability by putting continued pressure on the FCC to adopt restrictive rules limiting which signals and programs cable may carry and by waging a massive campaign to prevent the development of a pay cable industry. Now, to further their goal of throttling the cable industry, the broadcasters have turned to Congress in an effort to cripple permanently a potential rival by way of copyright legislation.

[13] Since advertisers ultimately pay for the use of broadcast copyrighted material, and this cost becomes part of their product prices, requiring cable subscribers to pay additional royalties for viewing broadcast programs is a double payment from them—as well as a double payment to the copyright owner.

[14] For example the development of the pay cable industry promises to be of immense benefit to copyright holders. Yet a precondition of such development is the existence of a financially sound cable industry.

and it is arguable that the further "plus" of copyright fees is unwarranted.

Nonetheless, copyright fees appear to be an upcoming reality, and the purpose of this memorandum is to present Times Mirror's thoughts on an equitable fee schedule and on methods of administration. To summarize, our chief views are that:

—The royalty ceiling in H.R. 2223 should be reduced to the range of 1.5–1.75% of gross revenues.

—There should be no review of initial royalty rates for 7 years.

—The role of the Copyright Tribunal should be recast to one of recommending rates, with the ultimate disposition being made by Congress itself.

In making these suggestions, we are not asking the Copyright Bill be cast as a cure for the CATV industry's economic ills. But it is our strong view that no royalty legislation can be reasonable that measurably increases those ills.

Tests of reasonableness

While exact rates that fulfill "reasonableness" tend to be difficult to establish, the conceptual bounds of "reasonableness" are not, and we would like to start with the latter. Our belief is that an equitable fee schedule should meet these tests:

—"Credit" should be reflected for the audience-enlargement CATV is providing copyright holders.

—Clearly, the fee schedule should not be confiscatory by taking an inordinate share of CATV's profits.

—It should not even depress earnings unduly, which can only impair CATV's ability to attract capital and hence to grow.

These points are expanded on in the next paragraphs, and are related to some of the fee proposals that have been made, including the provisions of H.R. 2223.

Application of tests

1. *Cable's Value in Audience-Enlargement.*—Certainly CATV is playing a significant role for copyright holders in two particular situations:

—Where CATV is serving communities with *no* television stations.

—Where CATV is providing two or more additional channels to communities that have *only one* local television station.

In the first category (*no television*), there are 1850 CATV systems serving 4.3 million households. This "market" is the equivalent of all the TV homes in Los Angeles and Minneapolis/St. Paul combined, simply to draw one comparison. As an indication of the "market's" financial worth, network and national spot revenues in these areas totaled $129 million in 1974. Since CATV viewers are qualified prospects for a vast amount of this advertising, Cable *is* benefiting advertisers, and a copyright-holder's product is made more valuable because of it.

In the second category (where CATV brings additional signals to communities that have *only one* TV station) there are 250 systems serving 900,000 households. Again, there are national advertisers "getting their message across" in areas where, without CATV, there would be no opportunity to do so.

If the two situations are added together, CATV's total audience enlargement is 5.2 million homes, or the equivalent of all the TV households in Los Angeles and San Francisco. In 1974, network and national spot advertising revenues in these markets totaled $154 million. Further, these 5.2 million homes comprise about 8% of all TV households in the U.S. There is value in an audience of this magnitude. And we believe the burden is on broadcasters and copyright holders to derive full benefit from it in any instances where they are not already doing so. We also believe that CATV should be granted credit for this audience-enlargement through a very *conservative approach* to copyright royalties.

(In fact, if Cable's audience really had "little or no value," as some broadcasters claim, why has the TV industry argued intensely at the FCC against permitting the sale of adjacent time by CATV operators, with or without copyright fees? And why have broadcasters argued so strongly for mandatory carriage of stations, with exclusivity protection, on various cable systems?)

2. *Avoidance of Confiscatory Fees.*—The Motion Picture Association of America has proposed a 16% royalty, and we mention it to illustrate how readily copyright fees could become confiscatory. In the case of our own cable subsidiary, Times Mirror Communications, a 16% royalty would take *164%* of the pretax profit we earned last year. Our situation is not atypical. According to the National Cable Television Association, such a royalty would exceed the whole industry's profits.

3. No Undue Impairment of Earnings.—There are sharp limits to CATV's genuine ability to pay copyright fees. In the main, the industry has exhibited little or no profitability. This circumstance, combined with its capital intensity, has resulted in investment returns that are poor by any standard. Yet, if cable is to obtain capital for future expansion (in homes served and services provided), returns that are already poor cannot get poorer. CATV will be shorn of the ability to attract capital.

Copyright fees bear heavily on Cable's investment attractiveness, for the mathematics of the situation are extremely sensitive! CATV's profit margins are extraordinarily thin (where they exist) and can be deeply eroded by what, on the surface, might appear to be a small copyright percentage.

This fact can be illustrated, for instance, using the 5% maximum rate (and associated sliding scale) that many copyright proponents have argued for. Applying it to our own operations, the results would be disastrous. A 5% sliding scale would have taken 31% of our 1974 pretax income away from us. Earnings impairment of this order would discourage further Times Mirror investment in cable television, and many other capital sources would react similarly.

Even the lower 2.5% maximum (and related scale) proposed in H.R. 2223 would have an extremely adverse impact on CATV financing. In our own case, it would have siphoned off 16% of all pretax profits.

(One wonders, incidentally, how producing companies would react to a fee of the same magnitude. A 2.5% charge against MCA's 1974 revenues would have reduced that company's pretax earnings 15%. For Twentieth Century Fox the reduction would have been 30%. And as another illustration, Columbia Pictures would have been driven into the "red." A spokesman for the MPAA has called the H.R. 2223 schedule "minuscule." It seems doubtful that his clientele would find it so were the schedule applied to them.)

4. Inability to Pass Royalty Costs Along.—The preceding discussion reflects the premise that royalty costs cannot be readily passed on by cable operators to their subscribers. We believe the premise is quite accurate.. Cable rates are set by municipalities who, in our experience, focus far more on political climates than on economics. Time and again, in rate presentations, we have had our financial data ignored, while the thrust of discussion has centered on "people don't want to pay more." Moreover, when relief is granted, it is only partial and the process of obtaining it typically extends over many months, and even years.

In some instances, too, cable prices are at the upper limit and further increases will cause more subscriber loss than a new rate can compensate for. This is particularly true in urban areas which represent cable's prime growth opportunity (and where cable construction costs and "off-air" competition are vastly greater). As a practical matter, royalties will have to come from the CATV operators' purse, and at best only much later and only in part from cable subscribers.

A suggested ceiling

Summarizing to this point, it is our belief that:

—The CATV industry, rather than "pirating" signals, is creating a substantial audience for broadcasters and copyright holders; and that credit should be given this fact.

—Further, the economics of CATV are fragile, and a seemingly little "bite" at the top (gross revenues) can cause a large swing at the bottom (net income).

—Finally, any undue depression of earnings can only result in CATV's being even less attractive to capital sources: money is difficult to secure now; material copyright fees will make it much, much harder.

There is no way of course to precisely translate factors like these into a fee schedule, and we do not envy those who have the task. Nonetheless, our own strong conviction is that the ceiling should be around 1.5% to 1.75% of quarterly gross revenues exceeding $160,000, not 2.5%, as H.R. 2223 provides. At the suggested level, that is 1.5% to 1.75%, Times Mirrors Communications would have given up 9.5–11% of its 1974 pretax income, and that is the most we can genuinely afford. Beyond these percentages, the earnings outlook is likely to be such that we would undoubtedly redeploy the cash flow from Times Mirror's cable properties into other corporate areas.

Moreover, a moderate royalty schedule—one that is clearly within CATV's practical ability to pay—is not necessarily antithetical to the copyright holders' interests. Their best chance of getting "more" from CATV is to help foster cable's growth. The process of investing more capital to serve more CATV subscribers

means more gross revenues, which compounded by the sliding scale for copyright fees, means ever increasing royalty incomes.

To illustrate, the CATV industry now serves approximately 11 million subscribers at an investment of some $890 million. It is conceivable—given access to capital—that by 1983 the number could grow to 22 million.[1] Under the royalty schedule suggested here, currently copyright holders would receive about $5.8 to $6.5 million from CATV. Given the opportunity for growth just described (and providing for at least some modest rate increase within an 8-year period) the holders' total receipts could increase to $25–30 million. This is not inconsequential. Further, such payments represent *pure income* to program producers (since distribution to CATV involves no additional expense). For the copyright holder, we believe that taking a long view offers a better "deal" than insisting now on higher copyright percentages that could choke cable growth.

We also believe that the copyright burden should be borne by all CATV operators, without distinction between "local" and "distant" signals. If everyone participates, then the financial impact on each system can be moderated while still producing a meaningful "pot" for program owners. Conversely, the "distant signal only" approach would thrust the financial burden of satisfying copyright holders on rural CATV—and the burden could become heavy. In truth, too, there are urban CATV systems serving "classic" parts of cities (where signal improvement is a necessity) that derive just as much benefit from broadcast signals as do outlying or remote systems. Times Mirror Communications is one example. The signals of the Los Angeles stations are just as economically important in serving the Palos Verdes Peninsula (which is within the Los Angeles Metropolitan Area) as they are when we "import" them to San Diego County—100 miles away. And finally, the "distant signal" approach would seem to us to involve some very difficult and complex definitions in a subject matter where complexity already abounds.

Establishment of a Review Mechanism

Conditions change and a royalty schedule that is equitable and realistic at one point in time might not be at another. Some review mechanism is needed if CATV copyright fees are enacted.

Our own strong preference is that Congress itself be the reviewing body. The reasons for this are stated later, but in brief, and to be frank, we think Congressional review would afford CATV the fullest assurance of a fair hearing.

However, if Congress chooses to assign review responsibility to a "Copyright Tribunal," there are three points in H.R. 2223 that are likely to be highly detrimental to CATV (or put in the reverse, seem structured in favor of copyright and broadcast interests). They are: (1) the short initial review period of just 18 months; (2) the absence of any stated criteria to guide rate making; and (3) the practical absence of any appeal from the Tribunal's findings.[2]

1. 18 Months Too Short. While acknowledging that conditions and cable economics may change, they certainly won't change this fast. That fact is obvious. Congress, along with participants from broadcasting, production, CATV, and other affected areas, will have expended material effort in working out a fee schedule. The presumption is that fair and reasonable rates will result. We do not see the sense in re-opening the whole matter just 18 months later. From Cable's standpoint, we will not be doing less for copyright holders than we are now by enlarging their audiences, and certainly there will be no substantial improvements in our economics and in our genuine ability to pay fees.

While this may be a false fear, it appears that the 18-month provision was designated for the benefit of those who would exact "more" from CATV. But there will be no "more" to exact.

We believe the initial fee schedule should have force for 7 years, and should be subject to review at 7 to 5-year intervals thereafter.

Aside from avoiding a near-term "rehash," there are good financial reasons for reasonable longevity in any initial fee schedule. The possibility of a fast (and probably adverse) change in cable-exacted royalties would add to the climate of uncertainty already surrounding CATV. We have presented mathematics showing how sensitive cable net income is to royalty percentages. Given the specter of a change in fees just 18 months ahead, capital sources will be

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[1] Frost & Sullivan Report of June 1975.

[2] It also seems unusual that a Copyright Bill would be used to grant broadcasters the right to sue CATV operators for what are essentially FCC infractions. This provision (Section 501) of H.R. 2223 smacks of a nuisance clause ripe for misuse and harassment, and in our view should be struck. Broadcasters have ample remedy through the FCC.

increasingly reluctant to invest. Certainly our own corporation would view cable royalties as a particularly risky unknown, and would adjust its capital spending accordingly.

Further, we believe that at least seven years are needed to obtain a sound understanding of cable's worth, which is lacking now. No one presently knows, for instance, whether urban penetration will ever be practical, or whether attractive investment returns can eventually be achieved, or if pay-TV will be a meaningful success, or if the so-called "extra services" (such as special interest programming or merchandising) will become practical realities. Only against a much more stable understanding of what cable is going to amount to can royalty fees be equitably adjusted—up or down.

2. Absence of Criteria.—H.R. 2223 states only that the Tribunal shall act "to assure that such royalty rates are reasonable. . . ." It does not set forth any criteria on the factors to be considered, and consequently there is no guidance on the basis for determining reasonableness. We believe there should be, and we obviously feel that CATV's *genuine ability to pay*—without impairment of its capacity to grow—should be one of the governing elements.

Similarly, we believe that any copyright liability should be limited to basic cable revenues, and should exclude revenues from auxiliary income—especially pay-TV where copyright fees have already been paid. H.R. 2223 appears to create an "open door" for an ever-enlarging royalty base.

3. Absence of An Appeal Opportunity.—H.R. 2223 further provides that the Tribunal's findings are final unless modified by a House of Congress within 90 days. As a practical matter, it appears impossible that the House or the Senate could act on such a matter (whose priority will not be high) in such a limited time. There is, in short, no real appeal from Tribunal conclusions.

4. The Tribunal As A Staff Body.—At the minimum, we believe the period for Congressional review of Tribunal actions should be increased to nine months. Beyond that, however, it is our earnest hope that the Tribunal's *role will be recast.*

We believe the Tribunal should *recommend* royalty rates to Congress, and that the *ultimate decision should be Congress'*. Frankly, our experience has been that CATV, as the newcomer in communications, is disadvantaged in proceedings against established broadcast and entertainment interests. CATV is much more likely to get objective treatment should Congress take Tribunal findings into consideration and then set royalty rates itself. Further, if the frequency of rate review is modified to the realistic intervals suggested earlier, the burden on Congress in making these determinations should not be onerous.

COPYRIGHT LAW REVISION

THURSDAY, JULY 10, 1975

House of Representatives,
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Badillo, Pattison, Railsback, and Wiggins.

Also present: Herbert Fuchs, counsel.

Mr. Kastenmeier. The committee will come to order. The hearing this morning will be on the revision of the Copyright Law, H.R. 2223 relating principally to public broadcasting. The House is set to go into session at 11 o'clock this morning.

We will proceed as well as we can. In the event of a vote, we may have to recess temporarily. With that in mind, the Chair will advise witnesses and members that the time allocation will be rigidly adhered to including colloquies in terms of questions and answers.

We will try to limit testimony to 5 minutes; if there is a compelling need to extend that period of time, we will turn to members for a continuation of examination.

We are meeting this morning principally to receive testimony on two amendments that were offered to the Subcommittee bill, were introduced in the Senate but were not adopted. Amendment No. 1815 was offered by Senator Mathias and would subject public broadcast of certain works to compulsory licenses to be determined by a copyright Royalty Tribunal. No. 1831 offered by Senator Bayh eliminates all qualifications and limits on the distribution of so-called ephemeral copies by government and nonprofit organizations.

Inasmuch as these provisions were not adopted they were not included in the Senate bill. However, the package before the members does include the text of both amendments. Both amendments are favored by public broadcasting interests and both are opposed by copyright owners.

[A copy of S. 1361 amendments follow:]

[S. 1361, 93d Cong., 2d sess.]

AMENDMENTS

Intended to be proposed by Mr. Mathias to S. 1361, a bill for the general revision of the copyright law, title 17 of the United States Code, and for other purposes, viz:

On page 86, line 3, insert the following new section in the table of contents to read as follows:

"118. Limitations on exclusive rights: Public broadcast of nondramatic literary and musical works, sound recordings, and pictorial, graphic, and sculptural works.".

On page 115, following line 14, insert the following new section to read as follows:

"§ 118. Limitations on exclusive rights: Public broadcast of nondramatic literary and musical works, sound recordings, and pictorial, graphic, and sculptural works

"(a) Public broadcast of nondramatic literary and musical works, sound recordings, and pictorial, graphic, and sculptural works shall be subject to compulsory licensing as follows:

"(1) Any public broadcasting organization or institution wishing to obtain a compulsory license under this section shall fulfill the following requirements:

"(A) At least one month before initial broadcast and thereafter at intervals and in accordance with requirements prescribed by the Register of Copyrights, record in the Copyright Office a notice stating its identity, address, and intention to obtain a copyright license under this section.

"(B) Deposit with the Register of Copyrights, at intervals and in accordance with requirements prescribed by the Register, a statement of account and the total royalty fees for the period covered by the statement based on the royalty rates provided for in clause (2).

"(2) The royalty rates under this section shall be determined by the Copyright Royalty Tribunal as reasonable royalty fees for the inclusion of nondramatic works in public television and radio broadcasts. Such royalty rates may be calculated on a per-use, per-program, pro rated or annual basis as the Copyright Royalty Tribunal finds most appropriate with respect to the type of the copyrighted work and the nature of broadcast use, and may be changed or supplemented from time to time as deemed appropriate by the Copyright Royalty Tribunal. In particular circumstances, royalty rates negotiated between one or more public broadcasting organizations or institutions and one or more copyright owners or agencies may be substituted for the applicable rates determined by the Copyright Royalty Tribunal.

"(3) The royalty fees deposited with the Register of Copyrights under this section shall be distributed in accordance with the following procedures:

"(A) During the month of July of each year, every person claiming to be entitled to compulsory license fees for public broadcast during the preceding twelve-month period shall file a claim with the Register of Copyrights in accordance with the requirements prescribed by the Register. Notwithstanding any provision of the antitrust laws (as designated in section 1 of the Act of October 15, 1914, 38 Stat. 730; 15 U.S.C. 12, and any amendments of such laws), for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory license fees among them, may lump their claims together, and may designate a common agent to receive payments on their behalf.

"(B) On the first day of August of each year, the Register of Copyrights shall determine whether there exists a controversy regarding the statement of account or distribution of royalty fees. If the Register determines that no such controversy exists, the Register shall, after deducting reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Register finds the existence of a controversy, the Register shall certify to such effect and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fees by the Tribunal.

"(C) During the pendency of any proceeding under this subsection the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

"(b) For the purposes of this section, 'public broadcast' shall mean production, duplication, interconnection, distribution, and transmission of 'educational television or radio programs' by or for 'noncommercial education or radio programs' by or for 'noncommercial educational broadcast stations,' as those terms

are defined in title III, part IV of the Federal Communications Act of 1934, except as may be otherwise exempted under sections 110(2), 111(a) (2) and (4), 112(b), and 114(d).".

[S. 1361, 93d Cong., 2d sess.]

AMENDMENT

Intended to be proposed by Mr. BAYH to S. 1361, a bill for the general revision of the copyright law, title 17 of the United States Code, and for other purposes, viz: On page 102, line 23, strike lines 23 to 35 and insert in lieu the following:

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work under section 110(2) or 114(a) to make copies of a particular transmission program embodying the performance and display, and to distribute such copies for transmission by or through other governmental bodies or nonprofit organizations.

The subcommittee will hear the arguments for both sides. It will examine the proponents and then the opponents in turn. At this hearing, it is the Chair's hope that the witnesses will confine themselves to these amendments and the subject matter of the amendments.

I understand that the parties here this morning have other issues which will perhaps need to be the subject of future hearings.

The Chair does not object if you wish to allude to those subjects but I would hope that you would not go into any depth or debate those questions this morning.

At this time, the Chair is very pleased to greet the witnesses already at the table, some of whom testified 10 years ago including representing Public Broadcasting System, Mr. Eugene N. Aleinikoff, counsel, Public Broadcasting Agency for Instructional Television and Mr. Donald Quayle, senior vice president for broadcasting, Corporation for Public Broadcasting.

Eric Smith, associate general counsel, Public Broadcasting Service, and the Association of Public Radio Stations is represented by Mr. William Giorda, manager, KUT–FM, member of the board of APRS. The Agency for Instructional Television is represented by Edwin Cohen, and the Florida Department of Education is represented by J. Warren Binns.

Gentlemen, you may proceed.

TESTIMONY OF A PANEL COMPOSED OF WITNESSES FAVORING THE LEGISLATION: EUGENE N. ALEINIKOFF, COUNSEL TO PUBLIC BROADCASTING SERVICE AND AGENCY FOR INSTRUCTIONAL TELEVISION; DONALD QUAYLE, SENIOR VICE PRESIDENT FOR BROADCASTING, CORPORATION FOR PUBLIC BROADCASTING; ERIC SMITH, ASSOCIATE GENERAL COUNSEL, PUBLIC BROADCASTING SERVICE; WILLIAM GIORDA, MANAGER, KUT–FM, MEMBER OF BOARD OF APRS, ASSOCIATION OF PUBLIC RADIO STATIONS; EDWIN B. COHEN, EXECUTIVE DIRECTOR, AGENCY FOR INSTRUCTIONAL TELEVISION; J. WARREN BINNS, ADMINISTRATOR, EDUCATIONAL RADIO AND TELEVISION, STATE OF FLORIDA, FLORIDA DEPARTMENT OF EDUCATION, TALLAHASSEE, FLA.

Mr. ALEINIKOFF. We here at this table represent principal organizations in public and educational broadcasting as those terms are com-

monly used and we have been active in copyright revision proceedings over the past 10 years or more.

We are here as we indicated on two major issues, the first being a compulsory license for public broadcasting. By the term "public broadcasting" we mean public broadcasting to external, general audiences such as appears during the late afternoon and night time on most educational and public stations, both radio and television across the country.

We are also here to ask that the original provisions on multiple recordings for instructional television be put back into the bill in the same way the revision bill was enacted in 1967 by the House of Representatives. Since that time, in the course of the Senate proceedings there have been restrictions placed on those recording rights for school broadcasting, differing from time to time, and the present draft of H.R. 2223 retains some of those restrictions.

I would like to emphasize the difference between the two amendments in terms of what kind of noncommercial broadcasting they relate to. In the case of general audience public broadcasting we are asking for the consideration of a compulsory license. For instructional broadcasting where there already exists an exemption, we are requesting recording rights to go along with that exemption.

I think that the best way to proceed is for Mr. Quayle, Senior Vice President of CPB, to give us an overall picture of public broadcasting.

Mr. KASTENMEIER. Let me interrupt to say that without objection, the statements as submitted to the committee will be received and printed in the record in full at this point.

[The documents referred to and certain related submissions follow:]

STATEMENT BY EUGENE N. ALEINIKOFF, ESQ. AS COUNSEL TO THE AGENCY FOR INSTRUCTIONAL TELEVISION AND OTHER EDUCATIONAL TELEVISION AGENCIES

As counsel to the Agency for Instructional Television and other educational television agencies, I should like to take this opportunity to comment on the proposed provisions relating to instructional television in H.R. 2223.

"Instructional television" is the term commonly applied to television programing specifically designed for classroom use as part of the formal educational process. These are the school programs regularly broadcast over most educational television stations during the school hours from 9 a.m. to 3 p.m. Instructional television schedules are almost always developed by the local public educational authority in conjunction with the ITV specialist at the local ETV station, and form an integral part of the teaching curriculum of the local school system.

From its earliest drafts, the Copyright Revision Bill in both the House and Senate has fully recognized the parallel needs of electronic and classroom teachers, and so included an instructional television exemption in Section 110(2) akin to the "face-to-face" teaching exemption in Section 110(1). Unfortunately, the recording restrictions currently imposed on instructional television in Section 112(b) of H.R. 2223 cannot help but substantially frustrate the practical application of the Section 110(2) exemption to American education.

Relevant Provisions of H.R. 2223. The instructional television exemption provided in Section 110(2) is as follows:

"§ 110. *Limitations on exclusive rights: Exemption of certain performances and displays.*

Notwithstanding the provisions of Section 106, the following are not infringements of copyright:

* * * * * * *

(2) performance of a nondramatic literary or musical work or display of a work, by or in the course of transmission, if:

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for

(i) reception in classrooms or similar places normally devoted to instruction; or

(ii) reception by persons to whom the transmission is directed because of their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction; or

(iii) reception by officers or employees of governmental bodies as part of their official duties or employment."

It should be emphasized that the Section 110(2) exemption does not apply to dramatic works such as plays or operas, since limited to non-dramatic literary and musical works. Nor does the ITV exemption apply to motion pictures and other audio-visual works, since limited to "display" which is defined in Sec. 101 as "in the case of a motion picture or other audio-visual work, to show individual images nonsequentially". What the ITV exemption does cover, therefore, is literature and poetry, biography and news, music and records, pictures and photographs, illustrations and charts—all materials that would commonly be available in classrooms under standard educational practice.

The Section 110(2) exemption is limited, however, to "performance" and "display". Recording permission for ITV transmission purposes must be found in Section 112(b), which reads in H.R. 2223 as follows:

"(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than thirty copies of a particular transmission program embodying the performance or display, if—

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public."

Thus the present Section 112(b) limits ITV recordings both in number of copies to thirty and in period of use to seven years insofar as the Section 110(2) exemption is concerned.

In order to eliminate these prohibitory restrictions under Section 112(b), the following substitute paragraph has been proposed by amendment offered by Senator Bayh in the current Senate Judiciary Committee proceedings on S. 22:

"(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work under section 110(2) or 114(a) to make copies of a particular transmission program embodying the performance and display, and to distribute such copies for transmission by or through other governmental bodies or nonprofit organizations."

The Senate Judiciary Committee has not yet acted on the proposed Section 112(b) amendment, but is scheduled to do so before reporting out the Senate 1975 Revision Bill.

Legislative History. Attempts at restricting the scope of the Section 110(2) ITV exemption are not new and have been made in one way or another since its original proposal in the 1960s. Indeed, the present House Revision bill went so far as to include a geographical broadcast limitation of 100 miles without interconnection, and an ephemeral recording restriction of no more than two copies, to be used for no longer than one year. The undisguised intent of the tight restriction was to confine the ITV exemption to unimportant and inconsequential local "live" school programming—an increasing rarity in instructional television where the prime emphasis is and must be on increased quality, long-term usefulness, wide availability and maximum effect from the tax-dollar. Consequently, when enacted by the House in 1967, the 100-mile broadcast limitation was early abandoned and the recording restrictions completely deleted on the House floor.

But the copyright interests have never given up on their earnest efforts to nullify the ITV exemption during the Senate deliberations since 1967. At their demand, the earlier two-copies-in-one-year limitation removed by the House was re-inserted in the Senate bill. Over their continuous objections, this 112(b) restriction has been successively expanded through efforts of Senate Judiciary Committee members to twelve copies usable within five years, and then

to the present thirty copies to be destroyed after seven years. While at first glance these latest numbers may seem far more ample than before, they unfortunately still are sufficiently restrictive to prevent practical application of the ITV exemption to the rapidly changing electronic world of American education.

Educational Advances. By reason of the explosive communications developments in recent years, school systems across the country have ever-increasing recording and transmission capabilities. Instructional television programs have long been re-recorded separately for multistation use. More and more demands are being made for multiple school recordings for institutional and classroom closed-circuit transmission when and as needed, rather than on fixed external schedules.

With the development of economical and efficient videotape and cassette recording devices, very few ITV programs are produced or broadcast "live." Most local ITV programs are designed for re-use in succeeding school years unless exceptionally timely in content. High-quality multi-state telecourses are specifically intended to be re-duplicated in quantity for maximum usefulness in several states over a number of school years.

The result is that numerical or time restrictions on ITV recordings, unless so broad as to be meaningless, are unnecessarily confining and inevitably inhibiting. Any ITV program worth its salt is sure to be re-duplicated, whether for local, state or national use, in many formats and for many purposes, all valid and desirable. To establish an arbitrary number of copies and an artificial destruction date not only serves no useful purpose, but runs contrary to the moving forces in American education today.

It is not without reason that the Congressional act specifically providing funds for special minority group education—the Emergency School Aid Act—requires that funded ITV programs be made available in as many forms and for as wide use as possible. To enact a new copyright law that is slanted in the direction of restricted instructional exposure is squarely inconsistent with these important efforts at upgrading local education through nation-wide television materials.

Analysis of Section 112(b). The manner in which Sec. 112(b) is now drafted in itself creates serious problems for instructional television agencies. Beyond the fact that the title of the section—"Ephemeral Recordings"—is somewhat misleading for standard ITV recordings, the present subsection language gives rise to serious questions as to meaning and effect.

In the first place, it is not clear whether the numbers and year limitations apply separately to each transmitting organization or collectively to the first transmitting organization alone. If the former, the number of permissible copies throughout the United States would be astronomical and in actuality, limitless. If the latter, what if an ITV series is produced and distributed by an established non-profit organization which is either not an ETV station itself (such as the Agency for Instructional Television, the Great Plains Library and the Public Television Library—which are the main ITV and ETV distribution agencies today) or acting as the coordination on a single project for educational systems and ETV stations in several states (as in the case of the AIT consortia series).

Secondly, what does the term "transmit" mean in Section 112(b)? Does it include any communication of an ITV program "by any device or process" as indicated in the Section 101 definitions or is it limited to ETV station broadcasting as might be presumed from its past legislative history? If the former, the 30-copy limitation is obviously entirely unrealistic for national use; if the latter, the many students in areas served by educational limited-frequency and closed-circuit systems supplementing standard ETV stations would be unreasonably barred from ITV program advantages.

Third, does Section 112(b) apply to unauthorized as well as authorized recordings? If it does, how can the thirty-copy or 7-year limits possibly be policed by any agency? If it doesn't, what possible purpose can be served by applying the limitations only to those educational agencies in direct contact with the producing or distribution organization?

Finally, what are the legal consequences of exceeding the copy and duration restrictions under Section 112(b)? Would a prohibited 31st copy invalidate the statutory authorization for the first 30 copies, and hence all become retroactive copyright infringements? In this respect, it should be noted the item (2) stricture against "further copies" makes no distinction between copies reproduced by the original transmitting organization and those made by any other institution or individual with or without permission. Similarly, would failure by any agency

to destroy every copy at the end of seven years again operate to reclassify all authorized copies as copyright infringements, including those dutifully destroyed during the 7-year period? Again, no allowance is made for inadvertent omissions nor is any provision made for third-party contractual violations, as in the case of copyright notice deficiencies for the benefit of copyright proprietors.

It is not difficult to anticipate the inevitable result of all these legal uncertainties—sufficient fear of infringement consequences by ETV stations and ITV distribution agencies to forgo not only Section 112(b) recording privileges but the Section 110(2) exemption altogether. It is submitted that only by amending Section 112(b) to provide far greater and much more certain recording flexibility can the ITV exemption have much practical educational effect in the years to come.

Statement of Donald R. Quayle, Senior Vice President for Broadcasting, Corporation for Public Broadcasting

Mr. Chairman and members of the Subcommittee, I am Donald R. Quayle, Senior Vice President for Broadcasting for the Corporation for Public Broadcasting. I am pleased to have this opportunity to present the views of the Corporation on HR 2223, a bill that provides for the general revision of the current copyright laws.

Since 1967, when representatives of noncommercial broadcasting last appeared before this subcommittee to testify on proposed copyright revision legislation, pervasive legal, organizational and structural changes have taken place in noncommercial broadcasting. The purpose of this statement is to summarize these changes for the subcommittee and to point out the effects that they have had, in particular on the relationship between noncommercial broadcasting and the United States Congress.

When last before this subcommittee, representatives of noncommercial broadcasting spoke of the decentralized, locally autonomous nature of noncommercial broadcasting, which made it drastically different from its commercial counterparts. Today, decentralization and local autonomy still remain the touchstones of noncommercial broadcasting and are essential to its vitality and mission. However, a very important element exists today that was absent when we last appeared before you. It is a commitment by the Congress, embodied in law and amplified in proposed legislation now pending before this Congress, to complement and assist noncommercial broadcasting in a manner consistent with its locally autonomous nature and in cognizance of first amendment considerations. Congress has committed itself to see noncommercial broadcasting live and grow, so that programs that constitute an expression of diversity and excellence will be available to all citizens of the United States.

In particular, enactment of the Public Broadcasting Act on November 7, 1967, set out the framework for Congress' commitment to noncommercial broadcasting. In that Act, Congress declared that encouragement and support of noncommercial broadcasting is in the public interest, and that while these are matters of importance for private and local development, this support and encouragement is also an appropriate and important concern to the Federal government.

Congress also found that ". . . it furthers the general welfare to encourage noncommercial educational radio and television . . .", and ". . . that it is necessary and appropriate for the Federal government to complement, assist, and support a national policy that will most effectively make noncommercial educational radio and television service available to all citizens of the United States."

Congress also envisioned in the Public Broadcasting Act, the existence of a private, nongovernmental corporation which would receive appropriated funds from Congress to carry out the goals and purposes of the Public Broadcasting Act of 1967. This resulted in the Corporation for Public Broadcasting, a private corporation organized under the District of Columbia Non Profit Corporation. Since 1969, when the Corporation became operational, Congress has appropriated a total of $222.5 million to the Corporation to be used to foster the full development of noncommercial broadcasting.

In this session, Congress is in the process of underscoring and amplifying this commitment through its consideration of unique legislation which will authorize and appropriate funds for five years on a matching basis, to be used by the Corporation for Public Broadcasting for its operational use and support of noncommercial broadcasting. This measure has cleared the full Commerce Committees of the House and Senate. We are hopeful of imminent approval by the respective Committees on Appropriations. This legislation not only represents a con-

tinued commitment by Congress, but reflects a continued recognition by the Congress of the unique and special position and nature of noncommercial broadcasting.

In 1967, this subcommittee eliminated the limited exemption from licensing and royalties that noncommercial broadcasters enjoyed as nonprofit users of certain copyrighted works. Your report stated that the reasons for this action were that the subcommittee ". . . found persuasive the arguments that the line between commercial and 'nonprofit' organizations is increasingly difficult to draw, that many 'nonprofit' organizations are highly subsidized and capable of paying royalties, and that the widespread public exploitation of copyrighted works by educational broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad 'not for profit' exemption could not only hurt authors but could dry up their incentive to write."

The Senate Committee on the Judiciary, in reporting out copyright revision legislation in the last Congress, also eliminated this special treatment for noncommercial broadcasters for identical reasons, and almost in identical words. That is, the Senate committee apparently deferred to the reasoning of the House Judiciary Committee on this issue.

We submit that the Congressional commitment to noncommercial broadcasting made subsequent to the time that the House Judiciary Committee wrote the above quoted words in March of 1967, and Congress' continuing recognition of the unique value of noncommercial broadcasting to the citizens of the United States, warrant reconsideration of those actions and words.

We believe that this commitment to, and recognition of, the special nature and public benefits of noncommercial broadcasting by the Congress might well support some form of special consideration for noncommercial broadcasting in the copyright area. This does not necessarily mean that noncommercial broadcasters would not be willing to make some form of payments to copyrightholders in recognition of valuable contributions that their works make in the production of programs of high quality and excellence. However, under H.R. 2223, as currently drafted, noncommercial broadcasters would be faced with a multitude of administratively cumbersome and very costly rights "clearance" problems that cannot help but impair the vitality of their enterprise. All noncommercial educational television and radio stations are locally owned and operated, some by colleges and universities, others by state or municipal authorities, still others by private, public service organizations. They are located in almost every state and in hundreds of large and small communities. Each is independent of the kind of centralized administration that would facilitate rights clearances.

Moreover, when it is realized that approximately 60% of the dollars supporting public broadcasting activities are state or federal tax revenues, that the urgent need for expanded and improved public broadcasting services far outstrips the dollars available to pay for them, and that each dollar spent in the administrative process of clearing rights will benefit neither the citizens for whose benefit public and private support of noncommercial broadcasting has been contributed nor even the copyright holder—the case for some form of special consideration becomes even more compelling.

Congress has not been unsympathetic to the financial burdens of public broadcasting in the past. When the costs of essential interconnection services threatened to impair the effectiveness of vital public broadcasting services to the people, the Public Broadcasting Act was written to permit relief in the form of free or reduced rates for interconnection.

The establishment of rates for interconnection services and the establishment of royalties for copyright use are at least analogous, and we would hope that the Committee would give full attention to an equally appropriate form of relief for public broadcasting in the copyright area. Certainly, the Public Broadcasting Act as a whole demonstrates overriding concern for the financial and administrative burdens of noncommercial broadcasting.

On behalf of the Board and management of the Corporation for Public Broadcasting, I extend our appreciation for this opportunity to address the subcommittee on the pending copyright revision legislation and thank the subcommittee for the interest and concern it has shown for noncommercial broadcasting.

Statement of Eric H. Smith for the Public Broadcasting Service

Mr. Chairman and Members of the Subcommittee, my name is Eric H. Smith. I am the Associate General Counsel of the Public Broadcasting Service. PBS is pleased to present its views on H.R. 2223 as this bill would affect public television in this country.

PBS appears today to strongly support two proposed changes in H.R. 2223. The first would add a new section providing a compulsory license for public broadcasting. The second would amend section 112(b) to remove the copying and year limitations affecting instruction by means of television.

PUBLIC BROADCASTING SERVICE

PBS is a non-profit membership corporation established in the spring of 1970 by the public television stations of the United States. It represents and is governed by 149 independent public television licensees who operate over 250 television stations throughout the country, including Guam, American Samoa, Puerto Rico and the Virgin Islands. On behalf of the stations, PBS distributes programming over interconnection facilities provided by AT&T, assists the stations in the acquisition of programs and in the development of financial support, provides to them a national program service, and represents their interests on national matters. PBS is governed by a Board, consisting entirely of the members of Boards of our member public television stations. These laymen work closely with a Board of station managers of these public television stations. The Boards of Governors and Managers of PBS are comprised of distinguished men and women elected by the stations themselves (lists of current Board members are attached).

COMPULSORY LICENSE

The public broadcasting compulsory license is now under consideration by the Senate Judiciary Committee as an amendment to the Senate Copyright Revision Bill passed last summer. A copy of the Senate amendment as introduced by Senator Mathias is attached to this statement.

The compulsory license we are urging is simply and explicitly designed to establish in the new copyright law a workable method of determining and paying fair compensation, without prohibitive delays and with reasonable administration, to the extent that satisfactory arrangements cannot otherwise be negotiated between the various copyright agencies and public broadcasting organizations. It is in no way an attempt to take unfair advantage of the authors or publishers of the copyrighted works included in public television and radio programs.

DESCRIPTION OF THE AMENDMENTS

Basically, what the proposed new public broadcasting section provides is similar to the compulsory licenses already included in H.R. 2223 for cable television systems (section 111), record manufacturers (section 115) and juke-box operators (section 116), and another compulsory license has also been proposed by the record companies and performer organizations for commercial broadcasting. It calls for the annual deposit of royalty payments by public broadcasting organizations with the Copyright Office, to be distributed by the Register of Copyrights as agreed between the copyright owners affected—or in the absence of their agreement, as determined by the new Copyright Royalty Tribunal to be established.

This public broadcasting compulsory license differs from the other compulsory licenses in the Copyright Revision Bill in three principal respects:

First, it applies only to non-dramatic works—such as books and periodicals, music and records, paintings and photographs. It does not apply to dramatic works such as plays or operas, nor to motion pictures or other audio-visual works such as film strips or television programs, whether pure entertainment or informational in nature;

Second, it calls for initial royalty rate determination by the Copyright Royalty Tribunal—which, in the case of the other compulsory licenses, is responsible only for requested review of original statutory schedules. This, it is submitted, will permit full and detailed consideration of exactly what type and amount of royalty fees are appropriate for the various kinds of copyrighted works and public broadcasting exposure;

Third, it specifically encourages substitution of mutually acceptable arrangements between copyright owners and public broadcasting for Tribunal determi-

nations. These private agreements may be effectively reached before or after Tribunal proceedings, on an individual or collective basis, and subject to such periodic revision as may be warranted.

I should also like to add a few words of anticipatory disclaimer in view of earlier comments in the Senate Committee proceedings. There is absolutely no disposition on public broadcasting's part to include unpublished works or dramatizations of non-dramatic works in this compulsory license. Hence, there is no possibility of serious interference with potential movie sales of popular novels or of pre-publication exposure of new music or private papers. Moreover, it is not intended that the Copyright Royalty Tribunal would be called upon to adjudicate public television or radio clearances item-by-item, work-by-work, program-by-program, station-by-station. Rather, it is to be assumed that blanket licenses and standard practices will soon be evolved under the direct guidance of the Copyright Royalty Tribunal when necessary.

NEED FOR A COMPULSORY LICENSE

The urgent need for copyright clearance assistance in public broadcasting is due to several inherent characteristics not encountered in commercial television, relating to (i) special nature of programming; (ii) repeated use of programs; (iii) varied type of producing organizations; and (iv) limited extent of financial resources.

Special Programming Nature. Public broadcasting programs are essentially informational or cultural in content. Not being situation comedies, quiz shows, sports programs or similar commercial fare, public television programs are much more oriented to bringing to the viewing audience the best of existing creative efforts as well as newly developed material. If the object of public broadcasting is to bring excellence to the American public, it cannot be questioned that the inclusion of great literature, music and art should be encouraged rather than restricted.

The often-quoted E. B. White comment, which originated in the Carnegie Commission Report of 1967, reflects this concern for what public television programming should seek to attain:

"Non-commercial television should address itself to the ideal of excellence, not the idea of acceptability . . . Television should be the visual counterpart of the literary essay, should arouse our dreams, satisfy our hunger for beauty, take us on journeys, enable us to participate in events, present great drama and music, explore the sea and the sky and the woods and the hills. . . ."

And the latest comparison of the national programming supplied by PBS as contrasted with the three commercial networks is also revealing in this regard:

PBS programing	*Commercial programing*
Cultural, drama and music—30.2 percent.	Drama, adventure—11.8 percent.
Children's—39.7 percent.	Comedy, variety—18.2 percent.
Public affairs—30.1 percent.	Feature films—10.6 percent.
	Daytime serials—15.8 percent.
	Quiz and audience participation—13.8 percent.
	Sports—9.3 percent.
	Children's—8.1 percent.
	News/public affairs—12.4 percent.

In short, the very character of public television programming is such as to necessarily include copyrighted works to an unprecedented extent. For example, PBS estimates that about 12,000 separate musical selections were performed and recorded last year in nationally distributed programs. While the majority were contained in children's educational series, such as Sesame Street, The Electric Company, Mr. Rogers' Neighborhood, and Villa Alegre, there were also adult-oriented programs such as Evening At Symphony from Boston, SOUL, a Black music performance series, and In Performance At Wolf Trap. Without relief from standard clearance practices the magnitude of the clearance burden would be staggering for national programming alone—which, as indicated above, is but a small fraction of overall public broadcasting production.

Finally, it should be emphasized that many public broadcasting programs have little flexibility in avoiding non-clearable copyrighted works. A music, literature or art series without contemporary composers, authors or painters would be unthinkable. Similarly, a public television producer has very little selection option in broadcasting community concert performances, poetry readings or art exhibi-

tions. Yet one non-clearance can invalidate an entire program unless an incomplete version is finally edited for what must be an inferior broadcast.

Repeated Program Use. Public broadcasting programs can be important to the American public only if they are widely available for viewing. As a consequence, public television patterns—especially for regionally and nationally distributed programs—have consistently called for repeated broadcast during the same week and repeat releases after the initial showing. This is not merely a matter of economics but also of philosophy. Public cultural and informational resources should continue to be usable so long as useful, and if valuable, should not be discarded after the evanescent impact of a single broadcast. Moreover, repeated program exposure is designed to provide the general audience with alternative viewing times, so that a missed program can still be seen.

Again, the national children's programs afford a revealing illustration. Almost all of the national children's programs are repeated daily; many are also shown again over the weekend. Each new annual Sesame Street and The Electric Company series regularly makes use of previous years' segments and is itself completely re-run twice every year. Mr. Rogers' Neighborhood now consists of a two-to-three year library, which can be expected to be rotated by local ETV stations over the next six years; Zoom is similarly available for rebroadcasting at will. Perhaps most indicative is Villa Alegre and the other minority educational series funded by the U.S. Office of Education, which, by the Emergency School Assistance Act mandate, must remain available for at least six years and hopefully, for even longer in order to justify federal financing.

It has been estimated that the average public television station repeats about one-half of its programs during the same week. All but a very few PBS national programs continue to be available for station re-release over at least a three-year period, on the conviction that anything less than this extent of availability would be a considerable disservice to the American public.

Moreover, since almost all national public television programs are pre-recorded for production, re-recorded for distribution by PBS, and again re-recorded by local stations for delayed and repeat broadcast, extended reproduction and duplication rights as well as performance and display rights are essential. Again, unless public broadcasting is relieved from standard clearance practices, clearance will never be easy or swift (if indeed possible at all) so long as necessary on a program-by-program, piece-by-piece, publisher-by-publisher, author-by-author basis—whether books, music, records or photographs are involved.

Varied Producing Organizations. There are currently over 250 public television stations licensed to 153 educational and public institutions, of which 52 are institutions of higher education, 18 are public school systems, 27 are state and municipal authorities, and 56 are community organizations. All together, it has been estimated by the Corporation for Public Broadcasting that some 36,000 hours of local programming are produced annually—of which about 29,000 hours are for general viewing rather than for in-school use.

In 1974, PBS distributed nationally 45 to 50 programs each week by coast-to-coast interconnection, or more than 3000 hours per year. Approximately 57 different public television stations and agencies throughout the country contributed as producers. This is in marked contrast to commercial broadcasting where production is highly centralized in Hollywood and New York. This diversity of production sources is central to the philosophy of public broadcasting as it was originally conceived by the Carnegie Commission and embodied by Congress in the Public Broadcasting Act of 1967. It was Congress' intention that programs produced for broadcast within the public broadcasting system should reflect the regional and local diversity characteristic of this nation. Through such diversity, the American people would be able to experience differing cultural and political viewpoints representative of all facets of the nation. As public broadcasting has grown and matured, this diversity has increased. PBS has distributed programs produced in virtually every state in the country. Many of these stations operate on very low budgets but have nevertheless been able to garner the creative and technical resources in their areas and bring quality programs to the American people.

To be required to establish separate clearance staffs at every station for local and national production purposes would constitute indefensible administrative duplication, even if at all feasible within limited personnel budgets. Nor would a centralized clearance office answer the problem, for unless standard practices and blanket payments can be established, long-distance communication

and coordination costs would be equally expensive, just as time-consuming and similarly frustrating. Moreover, such rights centralization would be inconsistent with the public broadcasting philosophy of independently controlled production.

Limited Financial Resources. Unlike commercial broadcasting, public broadcasting relies chiefly on funds derived from federal, state and local tax dollars for support, supplemented by contributions from the public, foundation grants, and corporate gifts. No paid advertising is permitted; no commercial exploitation allowed. Production and broadcasting budgets are minimal, and administrative resources extremely limited. The average public broadcasting licensee has an average operating budget of approximately $600,000 (1974 data).

It is easy to see how the added payment of copyright royalties will of itself be a real burden to most public television licensees. But more importantly, without clearance relief, the administrative costs of securing permissions will be overwhelming, which may force local stations to choose between using copyrighted works without clearance or avoid use of copyrighted materials altogether.

It is not unrealistic to assume an annual cost of from $25,000 to $50,000 for a clearance office for the smallest station in the system—with substantially larger amounts for larger stations—if copyright licenses are required for local as well as national production and broadcast. We can conservatively estimate that, for example, an average of ten pieces of copyrighted material would be used in each hour of local programming in the system. With 29,000 hours of local programs, this would result in 290,000 separate clearances with copyright proprietors unless workable clearance mechanisms are established. This would require additional staff, telephone calls, letters, extended negotiations, and record-keeping at a high cost to the system. We do not believe that it is appropriate to squander public broadcasting's scarce resources in administrative overhead with no benefit to the public or the copyright holder. Indeed, the result can only be less programming of lower quality and less use of copyright material to the benefit of no one.

It is the intention of Congress that public broadcasting bring to the American public the most artistic and thoughtful programming that can be derived from all creative and intellectual sources. In short, the object of public broadcasting is not private gain but public service—and this is vastly different from the primarily commercial interests generally active in entertainment and mass communications in the United States.

By its very nature, therefore, public broadcasting needs access to much copyrighted material for its content, requires both economy and expedition in copyright clearance, and must seek extensive exposure for its programs. Unfortunately, there is serious doubt whether these goals can be reached without a statutory compulsory license, especially if the "not-for-profit" exemption in the present law is eliminated.

COPYRIGHT INDUSTRY—PUBLIC BROADCASTING DISCUSSIONS

Since the introduction of the public broadcasting compulsory license amendment in the Senate, the principal public broadcasting organizations have, at the request of the Chairman of the Senate Subcommittee, engaged in separate meetings with music and literary representatives in an attempt to reach copyright arrangements that could conceivably satisfy essential public television and radio program needs within available personnel and financial resources. In both instances, these discussions have so far not borne fruit.

Our discussions with representatives of authors and publishers of literary material have been particularly disappointing from the standpoint of public broadcasting. From early in the discussions, publisher representatives steadfastly maintained that they could not legally discuss possible clearance fees with public broadcasting, and more, could not participate in any negotiations where royalty fees might be mentioned in their presence or absence. The author representative indicated further that all literary permission conditions must be left to the authors' discretion—i.e., how large a fee to charge, what program inclusion to permit, what program distribution to authorize, and ultimately, whether to grant permission at all. In essence, the author and publisher representatives have voiced their definite unwillingness to go beyond the possible development of a recommended permission form (which in fact need not be observed by any author or publisher)—and the establishment of a clearance assistance office (which could be discontinued at any time). These proposals might partially and temporarily help in reducing some of the endless delays and obstructions that are now encountered in literary clearances. But they come nowhere close to

meeting actual content, budgetary and production necessities for public television and radio programs.

As of last week, it was clear that the three music performing rights societies, ASCAP, BMI and SESAC, and the leading music recording rights licensing organization, The Harry Fox Agency, were not unanimous in their beginning annual demands—royalties which public broadcasting would be willing to pay despite the current "not-for-profit" exemption. Equally important as of that time, none of the major music agencies had been willing to make any commitment to continued group negotiations or to consider how unavoidable disagreements might be resolved in the future on any basis other than past commercial broadcasting practice. These commercial patterns are, of course, exactly what public broadcasting cannot afford—since they provide neither the comprehensive music rights nor the manageable royalty rates that can be arrived at only in joint negotiatons.

Just last Tuesday, however, another meeting was held. The music agencies there suggested the possibility of a license arrangement consisting of an initial payment to be made by public broadcasting for music use for a two year period followed by negotiations, and arbitration if needed, of royalties thereafter. This suggested arrangement was expressly to be in substitution of the compulsory license for music. While this proposal must be further analyzed by PBS, we believe that, if it comes through as generally offered, and, if we can reach agreement on the appropriate fee to be voluntarily paid in the interim, we may indeed find that those arrangements provide the satisfactory long term solution that public television has been seeking legislatively. In that event, appropriate modification to the compulsory license could be made. We believe strongly, however, that the compulsory license must be included in the bill at this time, and indeed, the very fact of its favorable consideration by this Committee would go far toward advancing these negotiations. Though we hope continued negotiation will be fruitful in this regard, we must continue to urge that legislative protection be provided until such time as a mutually agreeable long term solution has been guaranteed.

No similar meetings have been held on photograph and pictorial clearances simply because neither we nor the Senate Subcommittee nor anyone else has yet found any agency or individual able to discuss meaningfully these issues with us. Photographs and pictures are of prime importance in public television production, local perhaps even more than national, and under H.R. 2223 may well become virtually impossible to clear because of the tremendous difficulties in ascertaining, reaching and obtaining permission from the television rights holders in all but a few exceptional cases.

To sum up, there are currently specific "not-for-profit" exemptions in the Copyright Law for the broadcast of non-dramatic literature (section 1(c)) and non-dramatic music (section 1(e)), and no statutory prohibition at all on the telecast of pictorial works. We believe that a compulsory license similar to those already accorded to various commercial interests, to be a fair and workable compromise between a continuation of the present exemption in the current law and a complete nonexemption now contained in H.R. 2223.

We in public broadcasting firmly believe that we cannot accept the kind of short term, fractionalized and disparate clearance procedures offered in substitution in the past. Our only hope is that fair payment under practical arrangements can be better arrived at as an outcome of these Congressional proceedings—whether through formal proceedings conducted by the Copyright Royalty Tribunal or through long term agreements between the parties serving the same purpose. Otherwise, we foresee but two alternative results, both of which are to us unacceptable: (i) deletion of all copyrighted content from public broadcasting programs, contrary to public broadcasting's overriding interest, or (ii) endless and expensive clearance procedures and practices, which public broadcasting simply cannot afford.

Moreover, we believe that public broadcasting is no less deserving of legislative relief in the form of compulsory licensing than are cable television systems and juke-box operators. Our inability to do without copyrighted material is equally as great, and we are no more able to reach mutually satisfactory royalty arrangements with copyright owners.

As the Supreme Court stated just last week in the case of *Twentieth Century Music v. Aiken*:

"The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of

competing claims upon the public interest. Creative work is to be encouraged and rewarded but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the arts."

We respectfully submit that the requested public broadcasting compulsory license exactly and evenhandedly ensures this public interest balance described by the Supreme Court as so essential to the American copyright law.

Instructional broadcasting

PBS also supports and urges this Subcommittee to support an amendment to section 112(b) of H.R. 2223, so as to remove the copy and year limitations applicable to the production and distribution of classroom instructional programming. A copy of the proposed amendment, as introduced in the Senate by Senator Birch Bayh, is attached.

Section 110(2) provides an exemption for the broadcast performance of non-dramatic literary and musical works or display of a work in a television program designed primarily for classroom use. This provision—designed to further a national goal of public education—equates instruction by television with face-to-face teaching in the classroom, for which an exemption is provided in section 110(1). We believe that such exemptions are proper and are sound public policy. While section 110(2) provides an exemption for the broadcast performance of copyrighted works in an instructional context, section 112(b) effectively curtails this exemption—limiting it, in effect, to those very few programs broadcast live. This section places absolute limits on the recording of instructional broadcasts by restricting the number of records that can be made to thirty and the maximum duration of program use to seven years. The texts of section 110 and section 112 are attached.

Virtually all instructional courses developed by non-commercial educational broadcast stations are produced on videotape recordings. Therefore, the performance exemption in section 110(2) is absolutely limited by virtue of the thirty copy/seven year restriction in section 112(b), and in a majority of cases would effectively void such exemption altogether. PBS supports removal of such arbitrary limitations as an inappropriate barrier to education's use of broadcast technology.

BACKGROUND

When the Copyright Revision Bill was last considered by the Congress in 1967, the House, after extensive hearings, passed a bill which provided a complete exemption for the inclusion of non-dramatic copyrighted materials in programs intended for broadcast in connection with classroom instruction in the schools. The effect of such exemption was to equate instruction through broadcast technology with face-to-face teaching. PBS, on behalf of its member stations who produce the majority of such instructional programming, urges this subcommittee and the House to reinstate such a complete exemption and to reject the limitations introduced by the Senate and presently contained in the Senate bill and H.R. 2223.

Educational television and radio have come a long way since the first educational radio station began 50 years ago. There are now hundreds of educational television and radio stations performing vital services on behalf of public education in the United States. Most of these stations are adjuncts to, and licensed by the FCC to, public educational institutions. All are non-profit public agencies.

All public television stations are mandated by Congress and licensed by the FCC to provide, on a non-sponsored, non-commercial basis, educational and cultural services to the communities they serve. In addition to a wide diversity of evening programming for general and special audiences, all stations provide, in close liaison with local public educational institutions, programming designed for classroom instructional use. With the costs of formal classroom instruction escalating annually, educational institutions have increasingly turned to the medium of television to provide the highest quality instruction material—as an adjunct to face-to-face teaching—at the lowest possible cost.

Television and radio lessons for use in the classroom now cover almost every subject taught in the schools. Through the medium of television, for example, students gain access to the best teachers and a sophisticated curriculum. The public television producer works closely with the educator to determine what the students need. The producer then seeks the best resources available to make an effective instructional presentation. This requires resort, as it would for the classroom teacher, to copyrighted works. Perhaps a song will bring out an im-

portant point in a history lesson as well as a music lesson; a graph taken from a magazine or newspaper may be helpful to a science or mathematics class; a lesson in English literature must, of course, resort to the works in this field. Examples of such instructional programs currently being used in the schools are attached. Many of these works are copyrighted, many are used in a manner not subject to "fair use." Without resort to copyrighted works, instruction, whether by use of television or not, is simply not possible.

THE ROLE OF NON-COMMERCIAL EDUCATIONAL (PUBLIC) TELEVISION STATIONS IN INSTRUCTIONAL BROADCASTING

The vast majority of instructional television programs—designed for and used in the context of classroom instruction—are produced by local public television stations and entities. In 1974, approximately 75% of the hours of instructional programs used in classrooms was produced within the public television system or by non-profit educational entities. In 1974, the average public broadcaster aired over 1900 instructional programs amounting to just under 30% of all programs broadcast within the system. In fiscal year 1973, approximately 140 licensees produced over 6500 instructional television hours or over 45 hours of production per licensee. In short, the great majority of instructional television programs are produced by PBS member stations for use in connection with formal classroom instruction.

The means by which such programming is made available to the schools is quite complex, but less than 1% of such programming is produced and broadcast live. We estimate that much of even this 1% live programming is then recorded on tape for reuse later at the convenience of a school system. The principal means of distribution for instructional programming continues to be by use of the mail; that is, a program is produced and recorded on tape and is broadcast locally and "bicycled" to other stations. Because the production cost of television programming is relatively high, it must be shared among local stations and their associated school systems. Ordinarily, this is done by mail exchange, requiring the creation and use of program recordings.

THE EFFECT OF THE SECTION 112(b) RECORDING LIMITATIONS

Section 110(2) properly and necessarily narrowly limits the exemption to programs produced for classroom instructional purposes. The exemption recognized the importance of, and the unique and pressing need for, high quality instruction. This 110(2) performance exemption, though appropriate in itself, cannot be understood, however, without considering the limitations on the exemption contained in section 112(b). This section curtails the effect of the exemption by limiting it to programs for which no more than thirty copies are made and where use is no longer than seven years.

Thirty Copy Limit. Local station producers of instructional television programming for school use are, under this limitation, not permitted to make or authorize more than thirty copies of the program without seeking permission to use the individual copyrighted work within the program and paying for its use beyond this limitation. This restriction will, in practical effect, void the exemption in the bill and require either clearance and payment for all copyrighted material included in instructional programs or the resort to works not under copyright. The reason why this will occur is rooted in the nature of instructional television distribution.

By general practice, a local station produces a program and embodies it on at least two videotape copies. To be an effective educational assist, the program will be copied for playback on videocassette machines at a time when the relevant class meets. Though many students will watch the program when it is broadcast, the scarcity of broadcast time during the day inevitably requires that additional copies be made for use in classes not scheduled at the time of broadcast. It is likely, therefore, that more than thirty copies will be needed just to provide reasonable access to the program for a single school district. Moreover, if the program is well-produced and effectively meets educational needs, other television stations and school districts will want to use it. This requires that additional copies be made and exchanged. If the limitations in section 112(b) are not removed, the producer-educator will be forced, by the nature of the production and distribution process currently existing in instructional broadcasting, to decide during the production of the program, what the use is likely to be—in other words, before the production is completed, the producer must assess what material

he must use and whether or not it must be cleared and paid for. The process is not difficult to describe. The lesson producer must, at the time of production, choose among the following options, none desirable:

1. Use copyrighted works freely, without permissions or payments, but know that legitimate and necessary uses of the program must be curtailed, that classroom teachers or other stations cannot make more than the thirty copies. If a thirty-first copy is needed at some time after production is completed, clearance of every work in the program must be undertaken. This could be, in some cases, years after production is completed. Clearance at that time is a virtual impossibility. If permission is not given, that additional copy may not be made—resulting in normal and customary usage being effectively curtailed; or

2. The educator-producer uses no copyrighted works in order to ensure the effective distribution and use of the program. This will inevitably damage substantially the content and effectiveness of the program; or

3. To ensure that use of the program for its intended purpose is ensured, the educator-producer will attempt to obtain clearance for all copyrighted works during production. This will involve substantial administrative burden and costs, which, if the producer's judgment is incorrect as to the extent of use, will be a waste of effort and scarce funds. If permission is not obtained for a key work, the project may become impossible to produce as conceived.

To justify the expenditure of funds necessary to produce high quality instructional material, local station producers will be inevitably forced to choose the second or third option. The effect of the limitation is, therefore, simply to void the exemption or reduce the value of the program. PBS does not believe that this is intended by the Revision Bill and is not wise public policy.

Moreover, to police such a copy limitation is also virtually impossible unless distribution is centrally administered. Many programs are now distributed by multiple sources under non-exclusive licenses. A producer cannot assure against infringement—should the exemption be taken advantage of—unless distribution and use is effectively controlled by a single entity. This will work to change current distribution patterns whereby there are multiple distributors and individual taping facilities throughout school systems. Unless clearances are undertaken during the production process, distribution patterns will be forced to change. This is not desirable and will be one additional factor making any exemption unusable.

Seven-Year Limitation. Section 112(b) also limits the exempt use of any instructional program using copyrighted materials to seven years. Any analysis of instructional program use patterns requires the conclusion that such limitation is completely arbitrary. Many programs remain educationally valid and are used beyond seven years. While the proposed Revision Bill will not prevent use beyond seven years, use without individual clearance of and payment for copyrighted material, will be an infringement. The same options faced by the educator-producer with regard to the thirty copy limitation are faced with regard to the term of use. The producer must judge the potential useful life of the program before it is produced. If it is underestimated and clearances are not obtained, the program becomes unusable at the seven year point—clearance at this time being virtually impossible. A producer wishing to protect normal distribution and program life will then opt for clearance—thereby voiding the exemption.

PBS sees no virtue in placing a year of use restriction on the exemption.

APPARENT PURPOSE OF LIMITATION

In including a copy and year limitation in section 112(b) and in not accepting the House version as passed in 1967, the Senate apparently believed that certain uses of copyrighted material in instructional programming should not be exempt. The copy limitation must have been included so as to require clearance for programs which have wide distribution and large audiences. The Senate must have believed, however, that narrower distribution before smaller audiences should be exempt. Section 112(b) however, does not accomplish this purpose even assuming it is valid public policy. We have shown that virtually all instructional programs are available on tape and the thirty copy limit could be exceeded within a local school district. If, however, instructional programs are distributed by means of network interconnection—regionally or nationally—the limit, if we correctly read the current section 112(b), may never be exceeded. The number of copies has little or nothing to do necessarily with the extent of distribution. Any year limitation is even less justifiable if limitation on audience reach is

the justification. To take advantage of the exemption, the instructional broadcasting community will be tempted to change radically modes of distribution to ensure that no more than thirty copies are made. This will lead to centralization of distribution, and if burdensome clearances are required, will lead to centralization of production. This is antithetical to long-accepted principles of localism in education.

PBS believes that in balancing the public policy interest of providing protection to copyright holders, and in furthering the goals of education, a full exemption should be included in the bill. Since instructional programs are not, and will never be, a substitute for the face-to-face classroom teaching process, the sale of text material in the schools—for which authors are compensated—will in no way be hindered. Instructional programs cannot be, and are not intended to be, a substitute for the reading and studying process. Instructional program use is always accompanied by study guide material, including bibliographies, so that the student—stimulated and directed by the program—can pursue the subject matter covered in depth. The ephemeral nature of television simply does not permit the indepth treatment central to disciplined education; but it can provide stimulation to the student, direction and a well-organized curriculum.

In summary, the section 110(1) exemption for use of copyrighted material in the context of face-to-face teaching should apply in the same manner to teaching through electronic means. Since an individual teacher may take advantage of the 110(1) exemption, so should the teacher appearing on an instructional television program, even though recordings are made to make the lesson available in more than one classroom.

PBS believes that the compulsory license for public broadcasting and an amendment to section 112(b) removing copy and year limitation merit inclusion in the Copyright Revision Bill. We appreciate the opportunity to appear before the Subcommittee to urge that this be accomplished.

BOARD OF GOVERNORS, PUBLIC BROADCASTING SERVICE

Mrs. Bert E. Roper (1975), Teacher, businesswoman, civic leader, representing WMFE, Orlando, Florida.

Leonard H. Rosenberg (1977), Chairman, Chesapeake Life Insurance Company, Baltimore, Maryland, representing Maryland Center for Public Broadcasting.

Dr. John W. Ryan (1975), President, Indiana University, Bloomington, Indiana, representing WTIU, Bloomington.

Dr. John W. Schwada (1976), President, Arizona State University, Tempe, Arizona, representing KAET, Tempe.

Mrs. Stephen Stranahan (1975), Art historian, public relations, civic leader, representing WGTE, Toledo, Ohio.

Irby Turner, Jr. (1977), City Attorney, Belzoni, Mississippi, representing Mississippi Authority for Educational Television.

Robert G. Waldo (1977), Vice President for University Relations, University of Washington, Seattle, Washington, representing KCTS, Seattle.

Don E. Weber (1976), Independent oil and real estate operator, Corpus Christi, Texas, representing KEDT, Corpus Christi.

Term expiration dates shown in parentheses beside the name.

BOARD OF MANAGERS, PUBLIC BROADCASTING SERVICE

Dr. George E. Bair (1975), Director of Educational Television, University of North Carolina Television Network, Chapel Hill, North Carolina.

Frank R. Barreca (1976), Director Radio-TV Film Bureau & General Manager, KUAT, University of Arizona, Tucson, Arizona.

Ronald C. Bornstein (1976), Director & General Manager, WHA, Regents of the University of Wisconsin System, Madison, Wisconsin.

Martin P. Busch (1975), Executive Director, KUSD–TV/South Dakota ETV Board, University of South Dakota, Vermillion, South Dakota.

Henry J. Cauthen (1977), President & General Manager, South Carolina Educational Television Commission, Columbia, South Carolina.

J. Michael Collins (1977), President, WNED, Western New York Educational Television Assn., Inc., Buffalo, New York.

Miss Betty Cope (1976), President & General Manager, WVIZ, Educational Television Assn. of Metropolitan Cleveland, Cleveland, Ohio.

Miss Dona Lee Davenport (1975), General Manager, WTVI, Charlotte-Mecklenburg Board of Education, Charlotte, North Carolina.

Robert H. Ellis (1975), General Manager, KAET, Arizona Board of Regents, Arizona State University, Tempe, Arizona.

Dennis L. Falk (1977), General Manager, KFME, North Central Educational Television, Inc., Fargo, North Dakota.

Donley F. Feddersen (1976), General Manager, WTIU, Trustees of Indiana University, Bloomington, Indiana.

Dr. Lawrence T. Frymire (1975), Executive Director, New Jersey Public Broadcasting Authority, Trenton, New Jersey.

William S. Hart (1977), President, WYES, Greater New Orleans Educational Television Foundation, New Orleans, Louisiana.

David O. Ives (1976), President, WGBH Educational Foundation, Boston, Massachusetts.

Lloyd Kaiser (1976), President, WQED, Metropolitan Pittsburgh Public Broadcasting, Inc., Pittsburgh, Pennsylvania.

Dr. James L. Loper (1977), President & General Manager, KCET, Community Television of Southern California, Los Angeles, California.

William J. McCarter (1975), Executive Vice President & General Manager, WTTW, Chicago ETV Association, Inc., Chicago, Illinois.

Dr. Richard J. Meyer (1977), General Manager, KCTS, University of Washington, Seattle, Washington.

Arthur A. Paul (1977), Executive Vice President & General Manager, KVIE, Central California Educational Television, Sacramento, California.

Fred J. Rebman (1975) President & General Manager, WJCT, Community Television, Inc., Jacksonville, Florida.

Dr. Otto F. Schlaak (1976), Manager, WMVS, Milwaukee Area District Board of Vocational, Technical and Adult Education, Milwaukee, Wisconsin.

Robert L. Shepherd (1975), Executive Vice President & General Manager, WDCN, Metropolitan Board of Education, Nashville, Tennessee.

Sheldon P. Siegel (1976), Executive Vice President & General Manager, WLVT, Lehigh Valley Educational Television Corporation, Bethlehem, Pennsylvania.

Paul K. Taff (1976), President & General Manager, Connecticut Public Television Network, Hartford, Connecticut.

C. Gregory Van Camp (1977), Director of Radio, Television and Motion Pictures and General Manager, WWVU, West Virginia Board of Regents, Morgantown, West Virginia.

Term expiration dates shown in parentheses beside the name.

EXAMPLES OF INSTRUCTIONAL PROGRAMING PRODUCED BY PUBLIC TELEVISION STATIONS

Producing agency	Series title	Curriculum area
PRIMARY SCHOOL LEVEL		
21" Classroom (WGBH-TV, Boston)	All About You	Health.
WETA-TV: Washington, D.C	Celebrate A Book	Language arts.
KUON-TV: Lincoln, Nebr	Children's Literature	Do.
WVIZ-TV: Cleveland, Ohio	Explorers Unlimited	Social sciences.
21" Classroom (WGBH-TV, Boston)	Imagine That	Language arts.
WCVE-TV: Richmond, Va	Language Corner	Do.
WMPB-TV: Owings Mills, Md	Numbers Game	Mathematics.
WVIZ TV: Cleveland, Ohio	Stepping into Melody	Music.
Do	Stepping into Rhythm	Do.
WQED-TV: Pittsburgh, Pa	Tell Me A Story	Language arts.
Georgia Educational TV	Tune Up Shop	Music.
INTERMEDIATE SCHOOL LEVEL		
WEDH-TV: Hartford, Conn	Alive and About	Science.
WHRO-TV: Norfolk, Va	Animals and Such	Do.
WMPB-TV: Owings Mills, Md	Calling Careers	Guidance.
WVIZ-TV: Cleveland, Ohio	Can You Imagine?	Language arts.
WETA-TV: Washington, D.C	Cover to Cover I & II	Do.
WMPB-TV: Owings Mills, Md	Do You Get the Message?	Do.
21" Classroom (WGBH-TV, Boston)	How Can I Tell You?	Creative writing, dramatics.
A.I.T. Consortium	Images and Things	Art.
WNYE-TV, New York, N.Y	Places in the News	Current events.
KRMA-TV: Denver, Colo	Understanding Our World	Geography.
WQED-TV: Pittsburgh, Pa	Yes, No, Maybe I, II & III	Science.
WNYE-TV: New York, N.Y	African Anthology	Language arts.
KUHT-TV: Houston, Tex	English Composition	Do.
University of Michigan	From Franklin to Frost	Do.
KTCA-TV: St. Paul/Minneapolis	Masters of Our Musical Heritage	Music.
WETA-TV: Washington, D.C	Matter of Fact	Language arts.
Do	Matter of Fiction	Do.
21" Classroom (WGBH-TV, Boston)	Meet the Arts	Fine art.
WQED-TV: Pittsburgh, Pa	Secondary Developmental Reading	Language arts.
Georgia Educational TV	Why/1975	Contemporary affairs.
POST-SECONDARY LEVEL		
WMPB-TV: Owings Mills, Md	Instructional TV Utilization	Inservice.
WGBH-TV: Boston, Mass	Introduction to Sociology	Sociology.
Do	World History	History.

Statement of Association of Public Radio Stations

The Congress faces a difficult and perplexing set of private and public interest issues in its consideration of a change in the copyright law affecting public radio.

In the first instance, Congress must assure a fair and equitable return to composers and authors for their creative labor. Yet, we would suggest to you that the Congress also must weigh the considerable beneficial aspects of specially treating an infant public radio system to nurture its development for the larger public benefit.

We appear here today to support the Mathias amendment in principle. We feel that its provisions go a long way toward helping public radio at the *national* level cope with the problems of clearance of works for use in national programs. At the national level a compulsory licensing system is needed because:

(1) The clearance for national programming is complicated due to the way material is used;

(2) Administrative costs of clearance would erode the ability to use works.

However, public radio is not just a national radio system. It is based on local radio stations that are licensed to non-profit entities for noncommercial educational operation. The local public radio stations are small in size for the most part. The average annual budget for a public radio station is $132,000. A budget of such modest dimension has to be used to pay its staff, which averages 8 full-time employees, and to operate the station 16 hours per day, seven days a week, 52 weeks per year. Approximately seventy percent of the local station's broadcast day is locally produced.

Local public radio stations have two special problems: service to the print-handicapped and service of a unique nature to other listeners. We would like to address these problems briefly.

Print-Handicapped

First, we are seeking special consideration for any service designed to serve the print-handicapped, such as the blind or those too infirm to read.

Public radio stations that have the capability purchase receivers in large quantities and place them in the homes of families with a print-handicapped listener. The station then recruits volunteer readers who read topical and current newspapers, books, magazines and other literary material. As many as 250–400 books per year are read this way by the largest existing service, in the State of Minnesota.

Language has been worked out in the Senate resolving a significant part of the print-handicapped problem—it is now Section 110(8) of S. 22.

Total Exemption for Local Public Radio Performances

Second, the Mathias Amendment does not take into full account the disadvantage at which serious music listeners find themselves. Serious music on commercial radio is rapidly disappearing as more and more stations turn to popular music formats to insure financial survival.

If payment is required for local public radio performance of copyrighted music and literary works, programming in the arts on local public radio stations would be of such limited scope as to be virtually valueless. Broadcast of a vast body of existing works would be eliminated.

Conclusion

Local public radio stations simply cannot afford the cost either of the administrative burden or of making the payments for the local broadcast performance of literary and musical works. To be forced to do so would render this infant public radio system helpless and ineffective—a circumstance that is neither in the public interest, nor apparently one that is consonant with the intent of the Congress when it fostered the creation of public radio by passage of the 1967 Public Broadcasting Act.

But, despite our unique problems, we support your favorable consideration of the Mathias amendment. We sincerely hope the Subcommittee will explore our problems in detail in the fall.

Background Statement of Association of Public Radio Stations

The Congress faces a difficult and perplexing set of private and public interest issues in its consideration of a change in the copyright law affecting public radio, particularly as it would affect local public radio stations.

On the one hand, the Congress must assure a fair and equitable return to benefit composers and authors for their creative labor.

On the other hand, the Congress must weigh the considerable beneficial aspects of specially treating an infant public radio system, thereby making possible its continued development for the larger public benefit.

Local public radio stations support the Mathias Amendment in principle. They feel that its provisions go a long way toward helping public radio at the *national* level cope with the problems of the clearance of literary and musical works for use in nationally distributed programs.

Background

Public radio is not just a national radio system, however. It is based on local radio stations that are licensed to non-profit, educational entities by the Federal Communications Commission. To benefit the public interest, the Commission reserved noncommercial educational frequencies in 1941.

Through the Corporation for Public Broadcasting, which was created by the Congress in 1967, a new concept has been developed in noncommercial radio called "public radio"—a system that is new despite the fact that some stations within it have been on the air for more than 50 years.

The Corporation for Public Broadcasting established minimum performance criteria for noncommercial radio licensees to determine their eligibility to receive federal assistance at comparatively modest levels of funding. Currently, 175 local public radio stations are eligible to receive such assistance. (To illustrate this point, contrast the Corporation for Public Broadcasting Community Service

Grants to be awarded in Fiscal 1976 to a community joint licensee in Hershey, Pennsylvania: WITF–TV—$175,000/WITF–FM—$18,790.)

To date, these 175 stations are able to serve only 62 percent of the population. Yet, by mandate of the 1967 Public Broadcasting Act, this must be expanded so that the nation's local public radio stations may serve "all the people."

A profile of the average local public radio station reveals this kind of evidence. It is small in size for the most part: and, by commercial broadcast standards, or even by non-commercial television standards, at the local level it lives in abject penury with but few exceptions. The average annual budget for such a station is $132,000. Given a budget of such modest dimension, the local public radio station faces an immense task in the effort to discharge its obligation to provide effective public service. The station must pay its staff which averages 8 full-time employees, who must then operate the station 16 hours per day, seven days per week, 52 weeks per year. Approximately 70 percent of the local broadcast day is locally produced for service to specialized local audiences—audiences that, by and large, are interested in the fine arts, such as classical music, which accounts for almost 40 percent of the local station's average broadcast day. These audiences are interested as well in coverage of governmental activities at all levels, in radio reading for the print-handicapped, and in other similar kinds of special program services.

Print-handicapped exemption

(a) FACTUAL BACKGROUND

The primary use of literary works by local public radio stations is in reading services to the blind or those who are otherwise physically handicapped so that they cannot read.

Because of the unique nature of the FM broadcast signal, most stations can provide up to three broadcast services. In addition to the main channel—the service heard at home—FM stations have what are called subcarrier bands. These subcarrier bands can be used for broadcasts to specially tuned receivers. Public radio stations that have the capability purchase the special receivers in large quantities and place them in the homes of print-handicapped listeners. Volunteer readers are recruited to read topical and current newspapers, books, magazines and other literary material for broadcast over the subcarrier channel. As many as 250–400 books per year are read this way by the largest existing service, in the State of Minnesota.

Those stations that lack subcarrier capability use their main channel for the reading of literary material for this purpose. Because of the limited time for broadcast they of course read very few books. In addition, even those stations that can purchase some of the special receivers cannot afford to buy enough to meet the demand and have to turn to their main channel for some service.

Denying the blind access to printed material would be a most unfortunate form of discrimination. Access to topical information while it is still topical and current literary material while it is still current is a basic and fundamental right of all Americans. This right should not be denied to the print-handicapped when the technology to assure the right is available. Talking books and magazines available on recordings are not the answer because they do not reach their audience while the material is still topical and current.

Public radio stations receive no payment from print-handicapped individuals. Congress would impose a crippling burden on most of these services if it were to require copyright payment.

(b) LEGAL BACKGROUND

Local public radio seeks a total exemption from the provisions of Sections 110 and 112 for any service designed to serve the print-handicapped.

This issue arose during the Mathias Amendment negotiations which were convened by the Senate Copyright Subcommittee staff this spring. On May 28, 1975, in a meeting between representatives of public broadcasting, the copyright holders, and the Subcommittee staff, language was worked out resolving a significant part of the print-handicapped problem. The Senate Subcommittee approved it as Section 110(8) of S. 22, stating that the following would not be an infringement of copyright:

(8) performance of a literary work in the course of a broadcast service specifically designed for broadcast on noncommercial educational radio and television stations to a print or aural handicapped audience.

This resolved any question of performance for the print-handicapped violating the copyright. It did not, however, resolve the Section 112 question of a program recording as a copyright violation.

In other words, if a literary work were performed on the Washington Ear service for the print-handicapped, Section 110(8) would exempt that performance; likewise the same literary work performed over another service to the print-handicapped would be exempt. However, if a recording of the first performance was made to facilitate the second performance, that recording would violate Section 112. The Association of Public Radio Stations submits that perfecting language may be adopted easily.

Total performance exemption

(a) MUSIC BACKGROUND

The Mathias Amendment does not take into full account the disadvantage at which classical music listeners find themselves. Classical music on commercial radio is rapidly disappearing as more and more stations turn to popular music formats to insure financial survival. While the availability of classical music on the air is of marginal interest to some, it is of prime interest to a significant minority that deserves consideration and service; for, as the great German-American conductor Bruno Walter wrote in his autobiography:

. . . the works of the creative spirit last, they are essentially imperishable, while the world-stirring historical activities of even the most eminent men are circumscribed by time. Napoleon is dead—but Beethoven lives. (*Theme and Variations.*)

And philosopher-musician David Mannes wrote:

"Above all—at least to me—music is the perfect universal language. This is a platitude only because it happens like other platitudes to be based on incontrovertible truth. The only times when I have witnessed a state approaching the brotherhood of man have been moments of music, when hundreds of hearts beat to the same rhythm and lifted to the same phrase and when all hate, all envy, all greed were washed away by the nobility of sound. Words are so often the agents of destruction; music—good music—can only build. And to learn the language of music—or at least respond to it—one needs only an ear and a heart. It is only the deaf or the spiritually atrophied who do not somehow feel themselves exalted and purified in the presence of great music." (Quoted in *In Praise of Music*, Richard Lewis, editor.)

If payment is required for local public radio performance of copyrighted music, music programming on local radio would be of such limited scope as to be virtually valueless. Broadcast of a vast body of existing music would be eliminated, and one of the few outlets for the work of young contemporary composers would be closed. This is hardly a desirable result for composers, local public radio and, most importantly, the public.

Here, for example, is what Aaron Copland, the dean of American composers, has to say about the plight of contemporary composers:

"The art of music during the present century has undergone a violent upheaval. Audiences everywhere have shown signs of bewilderment at the variety of styles and tendencies that all pass muster under the name of modern music. Being unaware of the separate steps that brought about these innovations, they are naturally at a loss to understand the end result. Speaking generally, the lay listener has remained antagonistic, confused, or merely apathetic to the major creations of the newer composers." (*The New Music 1900–1960.*)

Given these conditions and the expense of rehearsing new works for performance, it is no wonder that local performing organizations give little of their time to 20th century music, denying its exposure to listeners. Public radio stations broadcasting classical music are one of the few avenues of wide audience exposure for contemporary composers and their works.

Copyright holders constantly conjure up the image of the struggling young composer on the brink of starvation being exploited by the use of works for which no compensation is paid. Such an image of exploitation by local public radio is not realistic. Most listeners would be happy if they never heard 99% of the music composed since World War II, and stations can attract more listener support with Mozart and Beethoven than with Cage and Berio. But public radio feels that it has an obligation to the composers of our time to give their works as broad an exposure as possible to as wide an audience as they can attract.

Similarly, the leading symphony orchestras of the country may feel it their duty to expose audiences to contemporary composers' works, but the hundreds of community and metropolitan orchestras will not risk ruin at the box office by scheduling such works unless their subscribers are ready for them—and the subscribers will not be ready unless they are exposed to contemporary music. The only hope for such exposure in most of the country is a local public radio station. This educative exposure can lead to performances by local orchestras, which produce income for copyright holders.

Public radio broadcasts can generate income for composers in another way. Record companies make their classical releases available to radio stations free or at cost. Broadcasts of the records make potential record buyers aware of them—and copyright holders receive money from records sold.

(B) LITERARY BACKGROUND

While music is the major component of local public radio's broadcast day, the stations are also the source of other kinds of the most creative and innovative programming in broadcasting. For instance, a station might produce an anthology of works by a number of different poets. Or the works of the poets laureate of a particular state might be featured. In such productions, the problems that stations face with literary works are the same as for music so the solutions must be the same.

(C) FINANCIAL BACKGROUND

Should copyright payments be required from local public radio stations, most of them will have to take on additional overhead in the form of personnel to handle copyright clearances. Unlike the situation in popular music, where the record companies provide stations with all of the copyright information needed for clearances, copyright information is not routinely provided in the field of classical music. Vast quantities of valuable and scarce staff time at local public stations would be taken up with tracing works. The commercial networks have large staffs that do nothing but this kind of work; the local public radio station simply cannot afford it. Moreover, many public radio stations keep no written record of what music they air. An obligation to keep such records will mean adding staff members to their overhead. A further expense will result from whatever reporting requirements the copyright holders impose upon local public radio stations. Finally, there are the payments themselves.

Copyright holders contend that public broadcasting is receiving great sums of federal, foundation and corporate money and, therefore, the copyright holders should now be paid for the use of the works they control. While this contention may have some limited merit at the national level of public broadcasting, it has no merit at all at the local public radio station level. Very few of the dollars in those "great sums" ever reach the local public radio station. For instance, WITF–FM in Hershey, Pennsylvania, will receive a total of $18,700 in federal money in Fiscal 1976; in Fiscal 1975 it received a total of $2,760 from corporations and foundations, and it has been promised $500 from these sources in Fiscal 1976.

The copyright holders point out that small commercial radio stations pay copyright fees and contend that small local public radio stations can, too. This argument refuses to see that small, so-called "Mom and Pop" commercial stations build their advertising rates to cover their copyright payments. Public radio stations have no advertising or other rates to adjust to cover these or any other costs. The majority are principally supported by tax revenues and additional funds can be obtained only from state, county and municipal treasuries that are already overburdened.

If the station is community licensed it cannot even ask a local government unit to increase its budget support. It can go only to its listeners. If asked to supply the funds to pay an additional $15,000 to $20,000 per year for broadcasts of music by contemporary composers, those in the community best able to afford increased contributions would likely be unsympathetic because, as indicated before, most listeners are indifferent to contemporary music—or even actively antagonistic toward it.

(D) LEGAL BACKGROUND

Public radio seeks only a Section 110 amendment for its performances (compared to Section 110 and 112 amendments for service to the print-handicapped). Language could be easily adopted exempting performances of non-dramatic literary or musical works in the course of a broadcast by a non-commercial educational radio station.

Conclusion

Local public radio simply cannot afford the cost either of the administrative burden or of making the payments for the local broadcast performance of literary and musical works. To be forced to do so would render this infant system helpless and ineffective—a circumstance that is neither in the public interest, nor apparently one that is consonant with the intent of the Congress when it fostered the creation of public radio by passage of the 1967 Public Broadcasting Act. Indeed, through that legislation, this nation's infant public radio system is in effect a child of the Congress itself. But even as the Chairman of the House's Communications Subcommittee has observed, local public radio has become the stepchild of public broadcasting. And public radio's submission is that without the modification in the Mathias Amendment requested here, H.R. 2223 would make local public radio a permanently retarded stepchild.

STATEMENT OF EDWIN G. COHEN, EXECUTIVE DIRECTOR OF THE AGENCY FOR INSTRUCTIONAL TELEVISION

I am Edwin G. Cohen, Executive Director of the Agency for Instructional Television (AIT), and I appreciate the opportunity to appear before this Subcommittee in connection with H.R. 2223, the House Bill for the General Revision of the Copyright Law.

The Agency for Instructional Television is a national non-profit organization seeking to strengthen education through television. Its predecessor organization, National Instructional Television, was founded in 1962 as a United States Office of Education demonstration project. AIT is headquartered in Bloomington, Indiana, and is governed by a Board of Directors appointed by the U.S. Council of Chief State School Officers with the Council of Ministers of Education in Canada. The majority of the Board are chief school officers from various states and provinces; the remainder of its directors are school and television administrators.

AIT's principal activity is the provision of recorded television programs for transmission to schools throughout the United States as well as in Canada. These ITV programs are transmitted mainly by public television stations. To a lesser extent they are transmitted by limited electronic systems such as ITFS (instructional television fixed service) installations and institutional closed-circuit television facilities. Nearly all public television stations transmit from four to five hours of instructional programming daily to the schools. ITV programs are used at least once a week during the entire school year by an estimated 25–30% of all public elementary and secondary students.

While this information is important to an understanding of school television, the real significance of television in the schools is to be found in the nature and quality of ITV programs. By and large, school television materials strengthen teaching in subject-areas where teachers, especially in elementary grades where classroom specialists are the exception, are not as effective as they would like to be. Thus there is great use of television instruction in science, art and music.

In addition, television can speed the adoption of newer educational approaches, such as the introduction of the so-called "new math." Television is also used extensively to add resources normally unavailable in the classroom, such as visits to foreign countries and interviews with famous people. Overall, the impact of television is to help improve instruction and equalize the educational opportunities available to all students.

In spite of its educational value, the development and distribution of school television programs is seldom commercially attractive. This is the case because the cost of creating acceptable programs is very high, the number of transmitting stations is relatively low, and there is not much money available in school budgets for television learning materials. Consequently, most school television programs are obtained in recorded form from non-profit distribution agencies such as AIT.

The Agency for Instructional Television currently makes available ITV series acquired in three ways: First it contracts for national distribution rights to ITV programs already produced by local and state educational agencies. Second, AIT makes financial contributions to the local cost of revising ITV series in return for national distribution rights for other school systems. Increasingly, moreover, AIT itself has caused high-quality telecourses to be created for national use by identifying common and widespread educational needs where television may be helpful, and then forming consortia of multi-state agencies to support development and production of the necessary ITV programming.

Once ITV series have become nationally available in these ways, AIT so informs school television services across the country, provides preview and evaluation opportunities, and arranges for distribution and use. To minimize cost, AIT makes several duplicate recordings for distribution to station users, who, in turn, usually forward them to subsequent users during the school year. After each year's circulation, recordings are returned to AIT for inspection and re-use in subsequent years. In some instances, the distribution arrangement is for AIT to make recordings on the videotapes of users, who, in turn, retain the recordings for repeated broadcast on a year-by-year renewal basis.

In providing recorded school television programs, it has been AIT's experience that the life of a school television series depends upon its educational validity and its technical adequacy. In its first thirteen years of existence as an agency, AIT has continued to distribute two series for ten consecutive years, two other series for nine years and one for eight years. All of these series were produced originally by local and state agencies, and later made available for AIT national distribution. In the area of new consortium production, AIT's first series is already in its fifth year of use, and because of its design and technical excellence, can be expected to have a useful life of two or three times as long.

In addition to this information on the life of telecourses, AIT has accumulated additional experience respecting numbers of recordings. To provide users with maximum copies, we have so far made the following number of recordings of each program of the following series:

All About You (2nd grade health)—57.
*Inside Out (5th grade health)—53.
*Bread and Butterflies (5th grade career development)—50.
Matter of Fiction (5th grade literature)—47.
*Self Inc. (junior high health)—43.
Ripples (1st grade social studies)—40.
Why (junior, senior high contemporary affairs)—33.

It should be emphasized that the numbers of copies listed above are those made only by AIT. In consortium series (marked with an asterisk), cooperating state agencies frequently need additional copies to adequately serve schools within their state. Accordingly, a major feature of consortium series is that cooperating agencies are entitled to reproduce copies as needed. A recent example of this additional reproduction is the "Inside Out" series. The N.Y. State Department of Education estimates duplication of approximately 1500 individual lesson copies throughout the state and in Pennsylvania, including over 250 individual copies made during the 1973-74 school year alone.

All of these series are clearly covered by the Section 110(2) ITV exemption. But none of the indicated uses would be feasible under the present Section 112 (b) recording restrictions—so that the Section 110(2) exemption could not be exercised for any program in the series.

To AIT, however, the danger in the current version of Section 112(b) is not due solely to those copying and time limitations. Our real objection is to the required application of inappropriate standards to what should be local determinations based solely upon instructional utility. ITV series are produced with public funds, out of state and local educational budgets. It is obviously wasteful to require valuable ITV materials to be discarded while still in demand. Nor does it seem sensible to preclude the widest possible use because of an automatic copying cutoff.

From AIT's own point of view, the net effect of the current Section 112(b) recording prohibitions can only be to bar the Section 110(2) ITV exemption exactly where and when most essential in nationally significant ITV telecourses. For AIT can never determine in advance the exact number of years of life or the exact number of copies desired for distribution. Nor, in these days of advanced recording techniques and equipment, can AIT police copying or duration prohibitions without serious risk of violation, so on both counts AIT may find itself in extensive copyright infringement at a time long past original planning and production. Further, the AIT infringement may date back to the beginning of distribution—even if the impermissible copying actually is unknown or unauthorized by AIT.

Thus, the Section 112(b) instructional television recording provisions, as currently phrased, are in reality prohibitory rather than permissive. In effect, the Section 110(2) instructional television exemption is negated for AIT national telecourses. Program recording and performance rights must be viewed as equally important for ITV production, and must be co-extensive to have practical utility

across the country. It is therefore urgent that Section 112(b) be extended to permit copying flexibility as, when and how needed by American school systems.

Thank you very much for your consideration. I hope that my comments have been of value in your subcommittee's deliberations.

STATEMENT OF J. WARREN BINNS, JR., ADMINISTRATOR OF INSTRUCTIONAL TELEVISION AND RADIO AND EDUCATIONAL PRODUCTS DISSEMINATION, DEPARTMENT OF EDUCATION, STATE OF FLORIDA

Florida Statutes require the Department of Education to provide through educational television and other electronic media a means of extending educational services, and also defines as the Department's duty the responsibility of identifying the needs of the state system of public education as they relate to the development and production of materials used in instruction. The Department is further empowered to commission or contract for the production of such materials. (Florida Statutes 229.805)

As the Administrator of the Instructional Television and Radio and Educational Products Dissemination Section, I am responsible for development and operation of a system to implement these programs. The philosophy upon which the Florida system is based is to view television and radio as a solution to the logistical problems inherent in the dissemination of instructional materials. I believe that this philosophy is central to the issue presently before this Committee.

In brief form, the Florida program consists of the following:

1. Acquiring materials, including the rights for reproduction, to meet statewide needs as recommended by local educators.

2. Distributing these materials by copying onto tape owned by local school systems; the product then becoming their property.

3. Acquiring materials by lease arrangements and loaning these to local school systems on a pre-arranged schedule.

This program began eight years ago by serving nine educational television stations and now serves these stations plus 49 of the 67 school systems (including ITFS systems) in the state on a regular basis (all school systems are served on an occasional basis). In addition, 25 of the 28 community colleges and eight of the nine universities utilize materials from our library. Of the school systems in the state, 73% use these television materials on their own internal distribution systems, and 13% use broadcast signals in addition.

The significance of these figures to the purpose of this Committee is the fact that individual sets of materials used by individual stations, individual school systems, and in many instances, individual schools, is the dominant pattern of use.

	Stations	Closed circuit	Total
For example (sets in use):			
Ripples	6	23	29
Art and artists	4	24	28
Why not explore rewarding careers?	7	24	31
Inside/out	6	22	28
Bread and butterflies	6	21	27

Typical pattern of use is the example shown below:

Broward County (Fort Lauderdale), Florida (138 schools, 138 sites)

A. Began with a shared single channel broadcast signal and expanded by adding four closed-circuit channels.

B. Presently they are providing 3.8 million viewings over their broadcast and closed-circuit systems and an additional 285,000 viewings by the distribution of video tapes to high schools only.

C. Future plans call for predominant distribution of materials to be by video tape and their present distribution systems for support of video tape distribution. Eventually this will mean individual copies in all schools.

The use of instructional television in Florida shows a rapid increase and, in fact, has doubled in the past year. The increase is in the area of multiple copies being used in a wide variety of distribution systems that permit scheduling and control of the material ultimately by the individual teacher.

Materials acquired by the Department are selected upon the following criteria:

1. Statewide survey of needs
2. Specifications provided by statewide committees
3. Validation criteria—pre-testing of materials with students (Florida Statutes 233.25 3(b))
4. Reproduction rights for distribution

All possible sources are explored for materials to meet these criteria. Whenever possible, we acquire materials produced for national distribution since they are usually far less expensive than materials produced within the state. There are many instances, however, when such materials do not meet requirements.

For example: Our specification for materials for instruction in metric measurement included a limit of five lessons, validation, and reproduction rights among other instructional objectives. After a thorough search of available materials we found that materials which included the required objectives exceeded the five lesson limit and that no materials were validated. As a result, we are presently producing our own materials at a greater initial cost.

There is a specific need for the in-state production of materials used in instruction. The unique instructional requirements of many educational agencies and patterns of distribution impose restrictions not always surmountable from national sources. Our successful instructional television service in Florida offers documented evidence of this. The requirements we impose are necessary for good instruction from the viewpoint of the quality of materials and the necessary distribution pattern.

The proposed limitation of 30 copies of instructional materials is not compatible with the present and planned patterns of usage of these materials. The most functional characteristic of video and other electronic forms of media is their inherent flexibility to meet varied patterns of usage. The present applications of these materials depends totally on the ability to generate multiple copies in a variety of formats to meet a variety of applications based upon need.

JOINT COUNCIL ON EDUCATIONAL TELECOMMUNICATIONS,
Washington, D.C., July 10, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. KASTENMEIER: At its January 22, 1975 Board meeting, the members of the Joint Council on Educational Telecommunications discussed copyright revision legislation with particular reference to the amendments submitted by Senators Mathias (Senate Amendment No. 1815) and Bayh (Senate Amendment No. 1913). At that meeting, the Board, without dissent, directed me to write this letter for your consideration and for the record to express our support of both amendments.

As you know, the JCET was founded in 1950 as the Joint Committee on ETV to lead the effort to reserve channels for educational television. Our interest in such newer communications technologies as cable and satellites in no way diminishes our concern with instructional and public broadcasting.

In reference to Mr. Mathias' amendment, we believe that a system of compulsory licensing of copyrighted materials is both just and necessary if public radio and television are to fulfill the role which the Congress intended for them in the Public Broadcasting Act of 1967.

Commercial broadcasting provides neither model nor analogy by which public broadcasting's need for timely access to copyrighted materials can be measured. The widely varied fare which makes up the public broadcasting schedule taps a potentially limitless range of nondramatic literary and musical works, sound recordings and pictorial, graphic and sculptural works. Still more important, public radio and television are decentralized, grass roots, systems. The network programs seen on PBS are not produced by the network, but by public television stations and other agencies. National Public Radio leans heavily on its member stations for the production of its network-distributed programming.

Only a system of compulsory licensing can provide the hundreds of noncommercial radio and television stations with timely access to materials for local and network programs while, at the same time, assuring that copyright holders will be adequately and fairly recompensed.

In the matter of Mr. Bayh's amendment, the JCET holds that removal of arbitrary restrictions on the number and life of copies of instructional programs

made by governmental bodies and other nonprofit organizations is necessary to provide a climate in which well-produced, educationally sound, instructional programs can flourish.

As we said in my testimony of July 31, 1973, to the Senate Subcommittee on Patents, Trademarks and Copyrights:

"All our experience testifies to the fact that instructional programming of the highest quality—particularly in television—requires substantial resources. Rather than rely on what their own limited resources can provide, school systems, state-wide agencies, and noncommercial broadcasters are coming together to form consortia to finance instructional series for their own use and for sharing with other educational groups. In order to achieve financing and recoup the substantial investments which are required for program series which are professionally produced under the guidance of educational experts in content and methodology, the programs must be available for widespread and prolonged use. Because instructional broadcasting—and particularly instructional television—is at last emerging from the cottage industry stage, we suggest that statutory limits upon the number of tape copies which may be made, or their useful life, are counterproductive."

The members of the Joint Council on Educational Telecommunications urge that these amendments be introduced in the current session and adopted as a part of H.R. 2223.

Thank you for the opportunity to express our views.

Sincerely,

FRANK W. NORWOOD,
Executive Secretary.

Attachment.

1974 JCET MEMBERSHIP

Agency for Instructional Television.
American Association for Higher Education.
American Association of Community and Junior Colleges.
American Association of School Administrators.
American Council on Education.
American Library Association.
Association for Education Communications & Technology.
Corporation for Public Broadcasting.
Council of Chief State School Officers.
Great Plains National Instructional Television Library.
National Association of Educational Broadcasters.
National Catholic Educational Association.
National Education Association.
National Public Radio.
National University Extension Association.
Public Broadcasting Service.
Indiana Higher Education Telecommunication System.
New Jersey Public Broadcasting Authority.
Pennsylvania Public Television Network.
Southern Educational Communications Association.

AMERICAN COUNCIL OF THE BLIND.
Washington, D.C., October 2, 1975.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: We appreciate your including this letter in the record of the hearings on this legislation. This organization's concern with this legislation is that Section 110 does not include non-commercial radio broadcasts designed and presented for blind and handicapped audiences. We respectfully request favorable consideration for the following justification and proposed language for a new Paragraph 8 of Section 110:

"(8) performance or the reading aloud (whether in person or by phonorecords) of books and other literary works, musical scores, instructional texts, specialized materials and other printed matter in the course of a non-commercial broadcast service specifically designed or presented for blind or other handicapped persons (who are unable to read normal printed material as a result of such limitations) on any subsidiary radio carrier authority or cable transmission. Provisions

of this subsection shall apply to non-commercial telecasts specifically designed for the aural handicapped."

We are aware of the amendment adopted on this subject by the Subcommittee on Patents, Trademarks & Copyrights of the Senate Committee on the Judiciary but we are dissatisfied with that language for several reasons. First, the term "print handicapped" is a new term which has not been defined and which almost certainly includes millions of people whose reading disabilities are unknown. Second, the Senate amendment is restricted to public radio which does not exist in many regions of the country. Our proposed amendment is intended in part to permit non-commercial broadcasts for the blind and handicapped on subcarrier channels of commercial stations. Without this specific provision, such broadcasts could not exist on subcarrier frequencies in areas were there are no public radio stations.

The language of our proposed amendment follows closely the phraseology in P.L. 89-522 which authorizes library services for the blind through the Library of Congress. However, we have omitted the word "physically" before the word "handicapped" in the foregoing recommended amendment in order not to exclude such handicapping conditions as dyslexia which almost always results in a severe reading disability.

The American Council of the Blind is the only national membership organization which has actively promoted special broadcast services for the blind and handicapped. We do not want the bona fide interests of these people whom we represent to be adversely affected by a vague and expansive term such as "the print handicapped." If such an identifiable class as the print handicapped exists, except for the blind and handicapped, it is not organized and not represented.

We believe that the language or our proposed amendment will satisfy the objections of the Association of American Publishers and of the Authors League of America. Likewise we believe that this amendment will satisfy their concerns about the duplication and exchange of copyrighted material among such non-commercial broadcasters.

Respectfully,

AMERICAN COUNCIL OF THE BLIND, INC.,
Durward K. McDaniel,
National Representative.

Mr. QUAYLE. Mr. Chairman and members of the subcommittee. I am Donald R. Quayle, Senior Vice President for Broadcasting for the Corporation for Public Broadcasting. I am pleased to have this opportunity to present the views of the Corporation on H.R. 2223, a bill that provides for the general revision of the current copyright laws.

Since 1965, when representatives of noncommercial broadcasting last appeared before this subcommittee to testify on proposed copyright revision legislation, pervasive legal, organizational, and structural changes have taken place in noncommercial broadcasting.

The purpose of this statement is to summarize these changes for the subcommittee and to point out the effects that they have had, in particular, on the relationship between noncommercial broadcasting and the U.S. Congress.

When last before this subcommittee, representatives of noncommercial broadcasting spoke of the decentralized, locally autonomous nature of noncommercial broadcasting, which made it drastically different from its commercial counterparts. Today, decentralization and local autonomy still remains the touchstone of noncommercial broadcasting and are essential to its vitality and mission. However, a very important element exists today that was absent when we last appeared before you. It is a commitment by the Congress, embodied in law and amplified in proposed legislation now pending before this Congress, to complement and assist noncommercial broadcasting in a manner consistent with its locally autonomous nature and in cognizance of first amendment considerations.

Congress has committed itself to see noncommercial broadcasting live and grow, so that programs that constitute an expression of

diversity and excellence will be available to all citizens of the United States.

In particular, enactment of the Public Broadcasting Act on November 7, 1967, set out the framework for Congress' commitment to noncommercial broadcasting. In that act, Congress declared that encouragement and support of noncommercial broadcasting is in the public interest, and that while these are matters of importance for private and local development, this support and encouragement is also an appropriate and important concern to the Federal Government.

Congress also found that "it furthers the general welfare to encourage noncommercial educational radio and television" * * * and * * * "that it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make noncommercial educational radio and television service available to all citizens of the United States."

Congress also envisioned in the Public Broadcasting Act, the existence of a private, nongovernmental corporation which would receive appropriated funds from Congress to carry out the goals and purposes of the Public Broadcasting Act of 1967.

This resulted in the Corporation for Public Broadcasting, a private corporation organized under the District of Columbia Nonprofit Corporation. Since 1969, when the Corporation became operational, Congress has appropriated a total of $222.5 million to the Corporation to be used to foster the full development of noncommercial broadcasting.

In this session, Congress is in the process of underscoring and amplifying this commitment through its consideration of unique legislation which will authorize and appropriate funds for 5 years on a matching basis, to be used by the Corporation for Public Broadcasting for its operational use and support of noncommercial broadcasting.

This measure has cleared the full Commerce Committee of the House and Senate. We are hopeful of imminent approval by the respective committees on appropriations. This legislation not only represents a continued commitment by Congress, but reflects a continued recognition by the Congress of the unique and special position and nature of noncommercial broadcasting.

In 1967, this subcommittee eliminated the limited exemption from licensing and royalties that noncommercial broadcasters enjoyed as nonprofit users of certain copyrighted works. Your report stated that the reasons for this action were that the subcommittee ". . . found persuasive the arguments that the line between commercial and nonprofit organizations is increasingly difficult to draw, that many nonprofit organizations are highly subsidized and capable of paying royalties, and that the widespread public exploitation of copyrighted works by educational broadcasters and other noncommercial organizations is likely to grow.

In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad "not for profit" exemption could not only hurt authors but could dry up their incentive to write."

The Senate Committee on the Judiciary, in reporting out copyright revision legislation in the last Congress, also eliminated this special

treatment for noncommercial broadcasters for identical reasons, and almost in identical words. That is, the Senate committee apparently deferred to the reasoning of the House Judiciary Committee on this issue.

We submit that the congressional commitment to noncommercial broadcasting made subsequent to the time that the House Judiciary Committee wrote the above quoted words in March of 1967, and Congress' continuing recognition of the unique value of noncommercial broadcasting to the citizens of the United States, warrant reconsideration of those actions and words.

We believe that this commitment to, and recognition of, the special nature and public benefits of noncommercial broadcasting by the Congress might well support some form of special consideration for noncommercial broadcasting in the copyright area.

This does not necessarily mean that noncommercial broadcasters would not be willing to make some form of payments to copyright holders in recognition of valuable contributions that their works make in the production of programs of high quality and excellence.

However, under H.R. 2223, as currently drafted, noncommercial broadcasters would be faced with a multitude of administratively cumbersome and very costly rights "clearance" problems that cannot help but impair the vitality of their enterprise.

All noncommercial educational television and radio stations are locally owned and operated, some by colleges and universities, others by State and/or municipal authorities, still others by private public service organizations.

They are located in almost every State and in hundreds of large and small communities. Each is independent of the kind of centralized administration that would facilitate rights clearances.

Moreover, when it is realized that approximately 60 percent of the dollars supporting public broadcasting activities are State or Federal tax revenues, that the urgent need for expanded and improved public broadcasting services far outstrips the dollars available to pay for them, and that each dollar spent in the administrative process of clearing rights will benefit neither the citizens for whose benefit public and private support of noncommercial broadcasting has been contributed nor even the copyright holder—the case for some form of special consideration, becomes even more compelling.

Congress has not been unsympathetic to the financial burdens of public broadcasting in the past. When the costs of essential interconnection services threatened to impair the effectiveness of vital public broadcasting services to the people, the Public Broadcasting Act was written to permit relief in the form of free or reduced rates for interconnection.

The establishment of rates for interconnection services and the establishment of royalties for copyright use are at least analagous, and we would hope that the committee would give full attention to an equally appropriate form of relief for public broadcasting in the copyright area.

Certainly the Public Broadcasting Act, as a whole, demonstrates overriding concern for the financial and administrative burdens of noncommercial broadcasting.

On behalf of the Board and management of the Corporation for Public Broadcasting, I extend our appreciation for this opportunity to address the subcommittee on the pending copyright revision legislation and thank the subcommittee for the interest and concern it has shown for noncommercial broadcasting.

Thank you.

Mr. KASTENMEIER. Mr. Smith?

Mr. SMITH. Mr. Chairman and members of the subcommittee, my name is Eric H. Smith. I am the Associate General Counsel of the Public Broadcasting Service. PBS is pleased to present its views on H.R. 2223 as this bill would affect public television in this country.

PBS appears today to strongly support two proposed changes in H.R. 2223. The first would add a new section providing a compulsory license for public broadcasting. The second would amend section 112 (b) to remove the copying and year limitations affecting instruction by means of television.

Basically what the proposed new public broadcasting section provides is similar to the compulsory licenses already included in H.R. 2223 for cable television systems (section 111), record manufacturers (section 115), and jukebox operators (section 116).

It calls for the annual deposit of royalty payments by public broadcasting organizations with the Copyright Office, to be distributed by the Register of Copyrights as agreed between the copyright owners affected—or in the absence of their agreement, as determined by the new Copyright Royalty Tribunal to be established.

This public broadcasting compulsory license differs from the other compulsory licenses in the copyright revision bill in three principal respects:

First, it applies only to nondramatic works, such as books and periodicals, music, paintings, and photographs. It does not apply to dramatic works such as plays or operas, nor to motion pictures or other audio visual works such as film strips or television programs, whether pure entertainment or informational in nature.

Second, it calls for initial royalty rate determination by the Copyright Royalty Tribunal—which, in the case of the other compulsory licenses, is responsible only for requested review of original statutory schedules. This, it is submitted, will permit full and detailed consideration of exactly what type and amount of royalty fees are appropriate for the various kinds of copyrighted works and public broadcasting exposure.

Third, it specifically encourages substitution of mutually acceptable arrangements between copyright owners and public broadcasting for Tribunal determinations.

These private agreements may be effectively reached before or after Tribunal proceedings, on an individual or collective basis, and are subject to such periodic revision as may be warranted.

I should also like to add a few words of anticipatory disclaimer too, in view of earlier comments in the Senate committee proceedings. There is absolutely no disposition on public broadcasting's part to include unpublished works or dramatizations of nondramatic works in this compulsory license.

Hence there is no possibility of serious interference with potential movie sales of popular novels or of prepublication exposure of new

music or private papers. Moreover, it is not intended that the Copyright Royalty Tribunal would be called upon to adjudicate public television or radio clearances item-by-item, work-by-work, program-by-program, station-by-station.

Rather, it is to be assumed that blanket licenses and standard practices will soon be solved under the direct guidance of the Copyright Royalty Tribunal when necessary.

The urgent need for a public broadcasting compulsory license stems, on the one hand, from the particular nature of public broadcasting programs, their production and distribution, and, on the other hand, the idiosyncratic character of American literary, musical, and pictorial clearance processes. Unlike commercial broadcasting, public broadcasting relies chiefly on funds derived from Federal, State, and local tax dollars for support, supplemented by contributions from the public, foundation grants, and corporate gifts.

No paid advertising is permitted; no commercial exploitation allowed. Production and broadcasting budgets are minimal, and administrative resources extremely limited. The average public broadcasting licensee has an average operating budget of approximately $600,000 (1974 data).

It is easy to see how the added payment of copyright royalties will of itself be a real burden to most public television licensees. But more importantly, without clearance relief, the administrative costs of securing permissions will be overwhelming, which may force local stations to choose between using copyrighted works without clearance or avoid use of copyrighted materials altogether.

It is not unrealistic to assume an annual cost of from $25,000 to $50,000 for a clearance office for the smallest station in the system—with substantially larger amounts for larger stations—if copyright licenses are required for local as well as national production and broadcast.

We can conservatively estimate that, for example, an average of 10 pieces of copyrighted material would be used in each hour of local programing in the system. With 29,000 hours of local programs, this would result in 290,000 separate clearances with copyright proprietors unless workable clearance mechanisms are established. This would require additional staff, telephone calls, letters, extended negotiations, and recordkeeping at a high cost to the system.

We do not believe that it is appropriate to squander public broadcasting's scarce resources in administrative overhead with no benefit to the public or the copyright holder. Indeed, the result can only be less programing of lower quality and less use of copyright material to the benefit of no one.

It is the intention of Congress that public broadcasting bring to the American public the most artistic and thoughtful programing that can be derived from all creative and intellectual sources.

In short, the object of public broadcasting is not private gain but public service—and this is vastly different from the primarily commercial interests generally active in entertainment and mass communications in the United States.

By its very nature, therefore, public broadcasting needs access to much copyrighted material for its content, requires both economy and expedition in copyright clearance, and must seek extensive exposure

for its programs. Unfortunately, there is serious doubt whether these goals can be reached without a statutory compulsory license, especially if the not for profit exemption in the present law is eliminated.

Since the introduction of the public broadcasting compulsory license amendment then in the Senate, the principal public broadcasting organizations have, at the request of the chairman of the Senate subcommittee, engaged in separate meetings with music and literary representatives in an attempt to reach copyright arrangements that could conceivably satisfy essential public television and radio programs needs within available personnel and financial resources. In both instances, these discussions have so far not borne fruit.

Our discussions with representatives of authors and publishers of literary materials have been particularly disappointing from the standpoint of public broadcasting. From early in the discussions, publisher representatives steadfastly maintained that they could not legally discuss possible clearance fees with public broadcasting.

The author representative indicated further that all literary permission condition must be left to the author's discretion—i.e., how large a fee to charge, what program inclusion to permit, what program distribution to authorize, and ultimately, whether to grant permission at all.

In essence the author and publisher representatives have voiced their definite unwillingness or inability to go beyond the possible development of a recommended permission form (which in fact need not be observed by any author or publisher)—and the establishment of a clearance assistance office (which could be discontinued at any time.)

These proposals might partially and temporarily help in reducing some of the endless delays and obstructions that are now encountered in literary clearances. But they come nowhere close to meeting actual content, budgetary, and production necessities for public television and radio programs.

As of last week it was clear that the three music performing rights societies, ASCAP, BMI and SESAC, and the leading music recording rights licensing organization, the Harry Fox Agency, were not unanimous in their beginning annual royalty demands—royalties which public broadcasting would be willing to pay despite the current not for profit exemption.

Equally important as of that time, none of the major music agencies had been willing to make any commitment to continued group negotiations or to consider how unavoidable disagreements might be resolved in the future on any basis other than past commercial broadcasting practice.

Just last Tuesday, however, another meeting was held. The music agencies there suggested the possibility of a license arrangement consisting of an initial payment to be made by public broadcasting for music use for a 2-year period followed by negotiations, and arbitration if needed, of royalties thereafter.

This suggested arrangement was expressly to be in substitution of the compulsory license in the bill for music. While this proposal must be further analyzed by PBS, we believe that if it comes through as generally offered, and if we can reach agreement on the appropriate fee to be voluntarily paid in the interim, we may indeed find that

those arrangements provide the satisfactory long term solution that public television has been seeking legislatively.

In that event, appropriate modification to the compulsory license could be made. We believe strongly, however, that the compulsory license must be included in the bill at this time, and indeed, the very fact of its favorable consideration by this committee would go far toward advancing these negotiations.

Though we hope continued negotiation will be fruitful in this regard, we must continue to urge that legislative protection be provided until such time as a mutually agreeable long term solution has been guaranteed.

Mr. KASTENMEIER. Mr. Smith, your time is up.

Mr. DRINAN. What is the status of these two amendments? Were they offered or debated or what?

Mr. KASTENMEIER. My understanding is they were offered but not adopted in the Senate bill as passed.

Mr. ALEINIKOFF. They were offered in the Senate Judiciary Committee and on the floor of the Senate. They were not adopted. Part of the reason that was discussed at the time in committee was the fact that they had begun consideration of these two amendments too late to hold hearings on them or to do anything else with them. Since that time there has been an underlying understanding that they—would be reconsidered by the Senate committee. As a result, they have been reconsidered by the Senate Subcommittee on Copyrights. At this time, the Senate committee has again held hearings, requested us to meet with the copyright interests and now, we understand, are in the process of forwarding the bill plus the amendments as separate entities up to the full committee for consideration. They have not been refused or adopted at this time; they are being considered by the full committee.

Mr. DRINAN. Was there any debate on the floor of these two amendments?

Mr. ALEINIKOFF. There was no debate at all.

Mr. KASTENMEIER. Mr. Giorda.

Mr. GIORDA. The Congress faces a difficult and perplexing set of private and public interest issues in its consideration of a change in the copyright law affecting public radio.

In the first instance, Congress must assure a fair and equitable return to composers and authors for their creative labor. Yet we would suggest to you that the Congress also must weigh the considerable beneficial aspects of specially treating an infant public radio system to nurture its development for the larger public benefit.

We appear here today to support the Mathias amendment in principle. We feel that its provisions go a long way toward helping public radio at the national level cope with the problems of clearance of works for use in national programs. At the national level a compulsory licensing system is needed because:

1. The clearance for national programing is complicated due to the way material is used;

2. Administrative costs of clearance would erode the ability to use works.

However, public radio is not just a national radio system. It is based on local radio stations that are licensed to nonprofit entities for non-

commercial educational operation. The local public radio stations are small in size for the most part. The average annual budget for a public radio station is $132,000.

A budget of such modest dimension has to be used to pay its staff, which averages eight full time employees and to operate the station 16 hours a day, 7 days a week, 52 weeks per year. Approximately 70 percent of the local station's broadcast day is locally produced.

Local public radio stations have two special problems: service to the print-handicapped and service of a unique nature to other listeners. We would like to address these problems briefly.

Print-handicapped:

First we are seeking special consideration for any service designed to serve the print-handicapped, such as the blind or those too infirm to read.

Public radio stations that have the capability to purchase receivers in large quantities and place them in the homes of families with a print-handicapped listener. The station then recruits volunteer readers who read topical and current newspapers, books, magazines and other literary material. As many as 250–400 books per year are read this way by the largest existing service, in the State of Minnesota.

Language has been worked out in the Senate resolving a significant part of the print-handicapped problem—it is now section 110(8) of S. 22.

Total exemption for local public radio performances:

Second, the Mathias amendment does not take into full account the disadvantage at which serious music listeners find themselves. Serious music on commercial radio is rapidly disappearing as more and more stations turn to popular music formats to insure financial survival.

If payment is required for local public radio performance of copyrighted music and literary works, programing in the arts on local public radio stations would be of such limited scope as to be virtually valueless. Broadcast of a vast body of existing works would be eliminated.

Conclusion:

Local public radio stations simply cannot afford the cost either of the administrative burden or of making the payments for the local broadcast performance of literary and musical works. To be forced to do so would render this infant public radio system helpless and ineffective, a circumstance that is neither in the public interest, nor apparently one that is consonant with the intent of the Congress when it fostered the creation of public radio by passage of the 1967 Public Broadcasting Act.

But despite our unique problems, we support your favorable consideration of the Mathias amendment. We sincerely hope the subcommittee will explore our problems in detail in the fall.

Mr. KASTENMEIER. Thank you, Mr. Giorda. Mr. Cohen?

Mr. ALEINIKOFF. Before Mr. Cohen speaks, may I briefly outline the problem on the instructional television side, because it is a little bit complicated in the bill as it stands.

Section 110(2) provides an exemption for:

> Performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if:

(A) The performance or display is a regular part of the systematic instructional activities of a governmental body or a non-profit educational institution: and

(B) The performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) The transmission is made primarily for:

(i) Reception in classrooms or similar places normally devoted to instruction; or

(ii) Reception by persons to whom the transmission is directed because of their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction; or

(iii) Reception by officers or employees of governmental bodies as part of their official duties or employment.

It should be emphasized that the Section 110(2) exemption does not apply to dramatic works such as plays or operas, since limited to non-dramatic literary and musical works. Nor does the ITV exemption apply to motion pictures and other audio-visual works, since limited to "display" which is defined in Section 101 as "in the case of a motion picture or other audio-visual work, to show individual images non-sequentially."

What the ITV exemption does cover, therefore, is literature and poetry, biography and news, music and records, pictures and photographs, illustrations and charts—all materials that would commonly be available in classrooms under standard educational practice.

The Section 110(2) exemption is limited, however, to performance and display. Recording permission for ITV transmission purposes must be found in Section 112(b), which reads in H.R. 2223 as follows:

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under Section 110(2), or under the limitations on exclusive rights in sound recordings specified by Section 114(a), to make no more than thirty copies of a particular transmission program embodying the performance or display, if—

(1) No further copies or phonorecords are reproduced from the copies or phonorecords made under this clause, and

(2) Except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

Thus the present Section 112(b) limits ITV recordings both in number of copies to 30 and in period of use to 7 years insofar as the Section 110(2) exemption is concerned.

In order to eliminate these prohibitory restrictions under Section 112(b), the following substitute paragraph has been proposed by amendment offered by Senator Bayh in the current Senate Judiciary Committee proceedings on S. 22:

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work under sections 110(2) or 114(a) to make copies of a particular transmission program embodying the performance and display, and to distribute such copies for transmission by or through other governmental bodies or nonprofit organizations.

The Senate Judiciary Committee has not yet acted on the proposed Section 112(b) amendment, but is scheduled to do so before reporting out the Senate 1975 Revision Bill.

Legislative History: Attempts at restricting the scope of the Section 110(2) ITV exemption are not new and have been made in one way or another since its original proposal in the 1960's. Indeed the present House Revision bill went so far as to include a geographical

broadcast limitation of 100 miles without interconnection, and an ephemeral recording restriction of no more than two copies, to be used for no longer than one year.

The undisguised intent of the tight restriction was to confine the ITV exemption to unimportant and inconsequential local live school programming—an increasing rarity in instructional television, where the prime emphasis is and must be on increased quality, long-term usefulness, wide availability and maximum effect from the tax dollar. Consequently when enacted by the House in 1967, the 100 mile broadcast limitations were early abandoned and the recording restrictions completely deleted on the House floor.

But the copyright interests have never given up on their earnest efforts to nullify the ITV exemption during the Senate deliberations since 1967. At their demand, the earlier two copies in one year limitation removed by the House was re-inserted in the Senate Bill.

Over their continuous objections, this 112(b) restriction has been successively expanded through efforts of Senate Judiciary Committee members to twelve copies usable within five years, and then to the present thirty copies to be destroyed after seven years.

While at first glance these latest numbers may seem far more ample than before, they unfortunately still are sufficiently restrictive to prevent practical application of the ITV exemption to the rapidly changing electronic world of American education.

What we are talking about is the restrictions on the recording language at this time and Mr. Cohen will take up what that looks like in the national and state picture and Mr. Binns from the state and local point of view.

Mr. DRINAN. One question, who is opposed to this?

Mr. KASTENMEIER. Let the Chair answer that question. There are witnesses opposed to these various amendments and we will hear from them later, and they are the Association of American Publishers, the Authors' League of America, the American Society of Composers, Authors and Publishers (ASCAP), and Broadcast Music, Inc. They will appear following the witnesses now at the table.

We will now hear from Mr. Cohen.

Mr. COHEN. I wanted to make a few comments. We are not the evening part of public television, we are the daytime part, the part that very few people see except in classrooms. A quarter to a third of all children in school in the United States receive television broadcasts on the average of once a week.

In its early days it was nothing more than a convenient way of extending the impact of specialist teachers. In the areas of art and science and music and physical education many classroom teachers felt they were not fully competent to instruct in all these areas, so they welcomed a teacher who would come around once or twice a week.

That visiting teacher could not make it all the time. As a consequence, when television came along, this was a wonderful way in which a specialist teacher could make these visits electronically.

The difficulty was that if that teacher visiting electronically could only do it on live broadcasts, prior to video taping, then that teacher had to present each lesson two or three times a week and never could get sick or anything like that if there was to be instruction to all the classrooms.

When recording came along, you could select the best presentation of a specialist art teacher and retain their teaching because there wasn't a lot of difference between what the teacher would do one year and the next year.

In this way recording accumulated on the shelves of local stations and the schools would use them year after year. That was inherent in the use of school television.

A second thing I think that is worth pointing out is that television did not know any boundaries. It does not respect the local school district. It will hop over. A number of school districts are simultaneously able to receive a television signal.

As a consequence, in order to make best use of television, all of the schools that were served by broadcast stations would band together and form associations. This was inherent in the way television worked. It was also inherent in the cost of television. If you had to provide a weekly broadcast in a given area, it was going to cost more than a single school district could really afford.

As a consequence, the local districts early on began to pool their dollars. This was also true in diocesan education when several dioceses using television in the New York Metropolitan area came together and cooperated.

Gradually cooperation grew as costs grew. It was no longer possible for local agencies to pay for all program development. What was being used in southern California was just as applicable in northern California. Our agency came out of this movement, this urgency to distribute and economize.

We pooled funds from State agencies. We have had 45 different States that have joined cooperatively in major national projects. After doing all this, which is to say we have tried to combine resources or, to put it another way, we have had to make do with what we have, we make as many copies as is needed to serve the using school districts.

These copies are growing in numbers. I have documented in the report that I gave to you that one series in fifth grade health has already had 53 copies duplicated. As I understand the provision in 112(b) this would exceed the proposed statutory limit of 30 copies.

We made 53 copies because we had 30 or 35 agencies that had cooperated and had come to us and said if you will take our money together with the other people's money we will get something we will all be proud of. We had to deliver copies to the participating agencies. They in turn made additional copies because that is inherent in the responsibility that the State education agency has to the local education agencies.

State education agencies are a pipeline through which better materials can be distributed to the local agency. In Florida, 28 additional copies were made. In New York State 50, in Pennsylvania 8, 139 copies are documentable right now in this one series in 5th grade health.

The reason is that more and more teachers want to have television materials available as close to their control as possible so they can deliver that program when the children need it.

For these reasons it seems to us that the limitation on numbers is not really realistic, nor is the limitation on years realistic.

Mr. Kastenmeier. Thank you.

Mr. Binns?

Mr. BINNS. The philosophy of the program within Florida is simply that radio and television is a way of solving the logistical problems in the dissemination of instructional materials. In brief, it consists of this:

1. Acquiring materials, including the rights for reproduction, to meet statewide needs as recommended by local educators.

We deal with statewide needs only.

2. Distributing these materials by copying onto tape owned by local school systems, the product then becoming their property.

The motive behind this is to make sure that the control of the use of these is as close to the local teacher as possible. I will illustrate that in a moment.

3. Acquiring materials by lease arrangements and loaning these to local school systems on a prearranged schedule.

This program began 8 years ago by serving 9 educational television stations and now serves these stations plus 49 of the 67 school systems (including ITFS systems) in the State on a regular basis (all school systems are served on an occasional basis).

In addition, 25 of the 28 community colleges and eight of the nine universities utilize materials from our library. Of the school systems in the State, 73 percent use these television materials on their own internal distribution systems, and 13 percent use broadcast signals in addition.

It is purely a factor of channel capacity.

The significance of these figures to the purpose of this committee is the fact that individual sets of materials used by individual stations, individual school systems and in many instances individual schools, is the dominant pattern of use.

I cite some examples in the statement submitted to you. In all but one of these, these are parts of national series which of course have had similar treatment in other States.

The use of instructional material in Florida shows a rapid increase and in fact has doubled in the past year. The increase is in the area of multiple copies being used in a wide variety of distribution systems that permit scheduling and control of the material ultimately by the individual teacher.

Materials acquired by the Department are selected upon the following criteria:

1. Statewide survey of needs.
2. Specifications provided by statewide committees.
3. Validation criteria—pretesting of materials with students.
4. Reproduction rights for distribution.

All possible sources are explored for materials to meet these criteria. Whenever possible, we acquire materials produced for national distribution since they are usually far less expensive than materials produced within the State. There are many instances, however, when such materials do not meet requirements.

For example: Our specification for materials for instruction in metric measurement included a limit of five lessons, validation, and reproduction rights among other instructional objectives.

After a thorough search of available materials we found that materials which included the required objectives exceeded the five lesson limit and that no materials were validated. As a result, we are presently producing our own materials at a greater initial cost.

A good example of this is the Florida series. We presently have 34 copies in use.

There is a specific need for the instate production of materials used in instruction. The unique instructional requirements of many educational agencies and the patterns of distribution impose restrictions not always surmountable from national resources. Our successful instructional television service in Florida offers documented evidence of this.

The requirements we impose are necessary for good instruction from the viewpoint of the quality of materials and the necessary distribution pattern.

The proposed limitation of 30 copies of instructional materials is not compatible with the present and planned patterns of usage of these materials. The most functional characteristic of video and other electronic forms of media is their inherent flexibility to meet varied patterns of usage. The present applications of these materials depends totally on the ability to generate multiple copies in a variety of forms to meet a variety of applications based upon need.

Thank you.

Mr. KASTENMEIER. Thank you.

Mr. Smith, did you want to conclude?

Mr. SMITH. Seventy-five percent of the instructural programing used in the schools today is produced essentially within the Public Television System. I only want to point out that, in order to fall within the present exemptions in the bill, a lesson producer must decide at the outset of production to restrict and limit the distribution and use in the schools of a particular program by not allowing more than 30 copies to be made. But should distribution extend beyond 30 copies, which, as has been shown today is the normal distribution pattern, then the producer must clear every bit of copyrighted material in the program.

In the case of instructional programs this is extensive. This means that the exemption provided in section 110 is voided. We do not believe that this is what Congress intended and we do not believe it is wise public policy.

Mr. KASTENMEIER. Thank you, Mr. Smith.

That concludes the presentations. Mr. Aleinikoff, what is the present situation with respect to public broadcasting, of nondramatic music works?

The law presently is that you do not—you have an exemption, is that correct?

Mr. ALEINIKOFF. Under section 1(e) and section 1(c) there is a nonprofit exemption of the copyrighted works, and there is a question in the case especially of nondramatic musical materials of whether or not the copyright owner controls the recording rights that permit making recordings for nonprofit performance.

It is our position that such recording rights are sufficiently doubtful that that—so that we will not recognize them until decided by a court of law. As a consequence, neither public broadcasting nighttime programing nor instructional programs clear or pay for music. We feel we are covered by the not for profit exemption.

As far as literary materials are concerned, I think we probably follow that same course. In most cases there is also a question of what is

"fair use." There have been clearances of literary materials, but those are generally for programing where multiple copies are made of full poems or of entire children's books, and programs of that kind where the producers feel they should get clearance.

Mr. KASTENMEIER. Now as the bill passed the Senate and as it is contained in H.R. 2223, how are you left under those proposals in that connection?

Mr. ALEINIKOFF. I want to add one more thing. On photographs, we find there is almost no practice we can point to. There are many, many stations that use photographs without any clearance or permission whatsoever. There are larger stations that request permission and may even pay a small fee of $10 or something. So that is an area where there is no practice at all.

As far as how we are left under this bill, in terms of public broadcasting we have no clearance assistance whatsoever since the not-for-profit exemption will be removed. We will have to clear each piece of copyrighted material that goes into our programs. There is no real distinction that I can recall on the instructional broadcasting side. In ITV there is a performance exemption but not a recording exemption big enough to take care of our needs. Once you are past that exemption, in the ITV area, you are exactly where you are in the nighttime field for which there is no clearance assistance.

Mr. KASTENMEIER. As I understand your position, it is that you are willing that you pay royalties for nondramatic literary work, and music, photographs, and the like, but that you feel treatment must be separate from commercial broadcasting and you require a vehicle to set the rate and a vehicle, an instrument of payment for clearance purposes, is that correct?

Mr. ALEINIKOFF. I think that is correct, Mr. Chairman. I would like to refer back to Mr. Smith's testimony and perhaps he might want to expand on this. We do feel that the needs of public broadcasting, in terms of extensive use of copyrighted materials and the long term rights that our programs have—at least 3 years of repeated broadcast—and because of the makeup of the copyright industries themselves, require full scope rights for all music rather than multiple negotiations between two or three different music agencies and our many stations.

Mr. KASTENMEIER. You are addressing yourself to the issue of the compulsory license?

Mr. ALEINIKOFF. Yes. We have been trying to negotiate with the copyright interests for something in substitution for the compulsory license. Our problems are twofold. One, can our negotiations result in feasible solutions, and can they give us all the rights necessary, and two, is there some sort of a commitment or guarantee that whatever arrangements we can arrive at now will continue in the future?

This is a long-time copyright bill and we are concerned about continual periodic negotiations or clearances unless there is a copyright law tribunal to act as final determinator.

Mr. KASTENMEIER. The gentleman from Massachusetts?

Mr. DRINAN. Thank you very much.

I wonder if one or more of you would want to talk to the argument on the other side, that this is an erosion of the right of the owner of the copyright, and that after all schools and so on pay for textbooks. Why shouldn't they pay for copyrighted materials in other forms?

Mr. ALEINIKOFF. Mr. Cohen, would you like to answer this?

Mr. COHEN. Maybe the best answer is that there is nothing comparable to school television programs available from commercial sources. Publishing industries have found that it is possible to exist in the textbook area and to make a dollar.

But on the school television side, it has been defined as a marginal market at best and there has been no activity whatsoever there. In part it is because of the enormous amount of material required.

Television isn't like a single book or film, it is a series of 30 programs extending over the school year. Each program itself increasingly is going to have to be more and more like the commercial television that the youngsters see at home. This means that the initial investment is extraordinarily high.

If you make 30 hours for television, that is a sizable investment, and what is your market? We have 200 public television stations that are delivery points for broadcasting, and that is the maximum. That is all you can get. As a consequence that consumer market has been too small.

As a consequence there has been no commercial activity at all. It has been a pooling of resources on the part of the schools really to extend what the classroom teacher would do.

Mr. DRINAN. Those all, all those facts cut against your argument. Since there is no commercial market, according to you, the author has no rights and you have not answered the question. The author does have a right and you are not making any of that.

Mr. ALEINIKOFF. I think that what we are getting at is not so much the making of the programs as the inclusion of copyright materials in those programs.

There is a provision in the Act in 110(1) for classroom teachers to be able to use copyrighted materials. That is part of the whole structure of the Act of what those rights are. There has been recognition in this Act that there should be educational uses possible of materials that have been purchased from the publisher or the author.

We are saying here that the teacher over the air is the same as the teacher in the classroom. He is and she is—they have got to use the materials that are at hand and available. To the extent that they would have to clear those, it is not only philosophically incompatible with what I feel to be the copyright law under the Constitution and in the public interest, but it would also be impossible for him/her to construct programs and make those individual clearances.

Can you establish an automatic mechanism to make it easier, the way you do in public broadcasting? Our only answer is no, it is not a possibility. Many of these television lessons are made by schools themselves. On the national side it might be possible. It certainly would not be possible on the local or State side.

Mr. DRINAN. Do you foresee that some authors, some composers would lose substantial sums of money that otherwise they would obtain?

Mr. ALEINIKOFF. No, we don't because we don't think substantial sums of money are involved. I don't know what kind of royalties or uses we are talking about.

Mr. DRINAN. Strike "substantial." It would be the diminution of royalties for authors.

Mr. Aleinikoff. I don't think it is a diminution because they have never received those royalties and nobody has ever asked to receive them except in a certain few cases. If you have an English teacher that wants to read Robert Frost which is usual or play Aaron Copland, do something like that, or they want to read the newspaper, yes, if you require the payment of royalties and schools have to pay royalties under the bill, there is a diminution.

If you feel that those are the kinds of uses which are justifiable in the public interest, and not substantial in terms of any individual author or even group of authors, then there is no diminution.

Mr. Drinan. Do we have that privilege that the copyright privilege is there in the Constitution and it is rather in the nature of an absolute and we can really, as Congress says that we can, erode that? We can say if these things are used for public purposes then the author or the composer gets no royalties then?

Mr. Aleinikoff. You have that right constitutionally. There is a fair use provision in this act, section 107, that does make certain uses for these kinds of purposes specifically. There have been included in the House and Senate reports over the last 10 years descriptions of certain kinds of use that are permissible as "fair use."

If you look at all the other exemptions, you will find that Congress has determined, in its wisdom, that there are some permissible uses, whether they be State fairs or religious organizations or education or any other kind of noncommercial use. And, of course, there has been a jukebox exemption in this act for a long, long time.

Mr. Drinan. I realize that. Am I hearing you people rightly that you would almost delimit, almost have this for your purposes without limitation?

Mr. Aleinikoff. No, we are saying that the kind of permissible uses in any ITV program are limited. They are limited to certain kinds of materials and by their very nature. Nobody is going to make a 15 minute instructional program by reading a textbook.

There are limitations, and we can discuss what limitations there will be. We are only asking that once the program is made, let it be used as widely as it is possible to use it to the advantage of the children of America.

We are not asking for unlimited privileges to use a whole set of Encyclopaedia Britannica and put it on film. We are asking that once we have got that ITV program, let us use it.

Mr. Kastenmeier. Your time has expired.

Mr. Drinan. I wish you people would settle your differences and come to us with a compromise. Thank you.

Mr. Kastenmeier. The gentleman from New York?

Mr. Badillo. I think you made a good case for additional subsidies, but I don't think you made a case for special exemptions. We have a system in this country that from each according to his ability and to each according to what he can afford. There are a lot of people in my district that would agree with you that you are poor and you can't afford it and therefore you should not get less.

We have established the principle whether rightly or wrongly that there are property rights. That means that somebody can't afford other things. If that affects the substantial public interest then we provide subsidies. We provide subsidies for low-income housing and other things.

But that does not mean that we take away the right to negotiate for a higher payment on the part of the landlord or on the part of the fellow who writes the book or produces the play. How would you justify what you are seeking?

Mr. ALEINIKOFF. Let me go back one minute to say that we do have two separate proposals here.

Mr. BADILLO. I am talking only about public broadcasting.

Mr. ALEINIKOFF. On the public broadcasting side, we have said we agree with you. We agree that there should be some payment.

Mr. BADILLO. But you are asking that the Tribunal decide that. The basic property right involves rightly or wrongly the right to negotiate. In New York City you have Channel 13, the public broadcasting and a fellow is concerned that if what he has produced appears in Channel 13 it is going to make it more difficult for him to get it next week on Channel 4 or Channel 2 or the performance is such that it will lessen its value.

Now he might be absolutely wrong. He might do a much better job from your point of view or mine. From a commercial point of view, he might be right. A person has a right to make those mistakes. He should not have to have a tribunal for him.

If your argument is we can't afford it, we will go to another committee in Congress and we will give you a subsidy.

Mr. QUAYLE. We are talking about eliminating the middleman so that copyright owner would still receive the payment.

Mr. BADILLO. Once you have done it it is all over. You may then argue about the amount of money but you are eliminating the right to have it on the program because he may not want you to do it at all. That is the philosophic point I wanted to come to. In other words, you don't give him the right to decide whether to put it on. It might be the most important reason.

He might not want it on channel 13.

Mr. ALEINIKOFF. We are talking about music, literature and pictures. On the music side, there has never been any question about whether or not that music should be used for public broadcasting. The question is simply what payment and how to make the payment. There is no disposition that I know of on any music composer or publisher's part to keep music off our air or anybody else's air.

Photographs we almost have the same set up because those photographs, except in a very few cases with some leading magazines are generally available, but if we were to look for the authors or the photographers we probably could not find them easily enough to put them on.

I think you are getting at literature, books, poetry. Our answer is this: When a book has been published, whether it is in 100 copies or 100,000 or 1 million copies as a popular novel, we do not see how our reading this on television in small portions can ever make a difference in the commercial market. We are not talking about dramatization.

Mr. BADILLO. You don't see it but what you are really asking by this proposal of having a tribunal decide how much money the fellow should get, you are asking the fellow who has the copyright to be deprived of the right to say no to you.

Mr. ALEINIKOFF. Yes. This is just the way a library can have a number of copies usable for people.

Mr. BADILLO. This is now on television, on the same metropolitan television as channel 2 or 4. You say that he should not have the right to turn you down. You go on and then he can argue whether you are getting more or less for the performance but not whether or not the performance should go on.

That is the basis of one of the most important factors in the copyright thing, whether there should be reuse of it.

Mr. KASTENMEIER. The gentleman's time has expired. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I am interested in this rather minor, I guess, problem to the bill but major to the public radio people that print handicapped problems. I guess Mr. Giorda is the person to answer this.

Presently what do you do? You have readers reading novels and things of that nature and you have exemptions under present law?

Mr. GIORDA. That is right.

Mr. PATTISON. Is that exemption continued in the Senate bill?

Mr. GIORDA. It is partially there. Under Section 110(8) it is there. However, there is an additional piece of relief that would be needed under Section 112.

Mr. PATTISON. Elaborate on that.

Mr. GIORDA. Service for the present handicapped as you know is designed to provide a reading service for those who are blind or who are too infirm to read, novels, anything of this sort. We need access to the materials and we need also to be able to provide for recording to facilitate——

Mr. PATTISON. Let's just do the reading part of it. Under the Senate bill, there is no problem there. The exemption is continued. The problem is that if you want to get a volunteer to read at 3 o'clock in the afternoon to be put on at 8 o'clock in the morning, you have a problem of recording and that is not covered.

Mr GIORDA. That is correct.

Mr. PATTISON. You are not talking about broadcasting generally. You broadcast on a special channel.

Mr. GIORDA. That is correct on the subchannel.

Mr. PATTISON. It does not go to anybody who does not have that receiver.

Mr. GIORDA. As long as the reading service is being conducted on the subchannel of an FM station; however, there are certain—in fact, there are 20 AM only public radio stations that have some very limited reading services for the blind, limited because there is not enough time in their broadcast day to permit inclusion of more than an hour or so of this sort of material.

Mr. PATTISON. They just do that on the regular commercial AM?

Mr. GIORDA. Not commercial.

Mr. PATTISON. It could be done commercially.

Mr. GIORDA. That is right.

Mr. PATTISON. If it was done commercially, there is no exemption?

Mr. GIORDA. No.

Mr. ALEINIKOFF. May I interject for 1 minute? This is the subject that Mr. Kastenmeier alluded to as one which is going to be gone into much deeper in September in future hearings.

Mr. PATTISON. All right. In the area of public broadcasting to the extent that things are produced nationally by PBS or whatever, is

that the same problem as something produced locally? Does it pose the same problems?

Mr. ALEINIKOFF. Yes, it does. It is more difficult on the local side for the local station to clear. But on the other hand, as Mr. Smith said, the national programs are produced by local stations.

They are produced by perhaps half of the 200 stations.

Mr. PATTISON. They are produced locally but distributed nationally?

Mr. ALEINIKOFF. Yes. The national schedule is determined by local stations. The programs are produced locally and selected locally.

Mr. PATTISON. The Agronsky show is produced locally here in Washington and distributed nationally. Is there any place where the national stuff is produced?

Mr. ALEINIKOFF. No; only in the institutions like Sesame Street.

Mr. PATTISON. If it were a centralized kind of network the way a commercial network operates, it would be a different problem, nationally and locally?

Mr. ALEINIKOFF. It would be helpful if it were that way. I suppose that we could develop a staff to do this nationally. Somebody has suggested, well, why don't you do this for all the local producers on national programs?

The answer is that it just does not work. You can't produce a program in Detroit or Des Moines and use a clearance facility located someplace else. In addition there is always the problem of whether the national facility would have too much to say about what the contents of the local program is.

Mr. KASTENMEIER. The gentleman's time has expired.

The Chair would like to ask one or two questions further on the second go-around. Ten years ago, as I recall, the question arose as to whether some clearances could be achieved by agreement, where proprietors of copyrighted materials would be able to make it easier to clear material because clearance has always been a problem, not merely for broadcasts but for educators and others.

I gather 10 years later that there hasn't really been very much progress toward the clearance. Can you advise me what efforts have been made and what seem to be the difficulties in arriving at some mechanism for clearance?

Obviously you raised that issue.

Mr. ALEINIKOFF. We raised that in the context of the new copyright revision bill. Under the current law there are not for profit and other exemptions that we have been operating under for a number of years. When we ask the industries to sit down and talk and negotiate, we find that we don't have a monolithic broadcasting system in this country.

In foreign countries, there is a monolithic broadcasting organization. What we are faced with is not only three different performing rights organizations which up to the time the Senate committee asked us to meet in the same room with them, always wanted to negotiate separately. We are also faced with the fact that we have no place to negotiate the recording rights that for us are as essential as performing rights.

We have had all of these institutions coming together under a bill which gave us exemption, but under which we were willing to make a voluntary payment. Whatever negotiations we had, which-

ever side wants to take the blame or blame the other for it, those negotiations have never come to pass.

We feel on our side that we have made an attempt, especially on the music side. On the literary side, I guess we have discussed this as part of the general educational copying and fair use picture from time-to-time with representatives of the publishers and the authors, especially in terms of instructional broadcasting.

But we have never gone farther than that because there has never seemed to be any absolute need under the act. They certainly did not want to discuss it with us terribly much. As Mr. Smith said the publishers and authors have antitrust problems in terms of ever discussing standard arrangements, group arrangements, or even remedies.

There has just been no place to go. As you know, on the photographs we have had nobody to discuss with at all.

Mr. KASTENMEIER. Perhaps the question had better be asked of the other party. The characterization was either unwilling or unable or the inability. My last question is we have discussed this morning this Mathias amendment and the Bayh amendment very concisely.

What other issues confront public or instructional broadcasting in terms of copyright, which we may later have to deal with?

Mr. ALEINIKOFF. The main issues are programs for the disabled and the possibility of exemptions for local radio stations. In addition, we have the problem of recording public broadcasting programs for the school uses we are willing to authorize, which we are not quite clear about under the way the current bill as phrased.

Last of all, there is the problem of the newer methods of technology such as educational television channels or public access channels on cable television or closed circuit signals in schools, just because the developments in technology may need some clarifications. We are not very clear yet whether all that can be handled in report language but we would like an opportunity to come back and discuss it.

Mr. KASTENMEIER. The gentleman from New York?

Mr. PATTISON. I apologize. That ephemeral business went by me. I think I was talking to somebody here. Would you go over that again, the issue you discussed about ephemeral recordings?

Mr. ALEINIKOFF. The issue on ephemeral recordings is that the recording rights for instructional classroom programs has been segregated in the bill under the general topic of ephemeral recordings. That section was intended to permit broadcasters to make one or two recordings so that you could broadcast on a prerecorded rather than a live basis and so you could have network shows that were delayed by recording.

When we came down to looking at the problems of recording programs for instructional broadcasts for longer periods of time, that also was kept in the same section. It no longer fits.

Mr. PATTISON. You want to keep it and reuse it over and over again.

Mr. ALEINIKOFF. That is right. It is a misnomer to have it in that section. We would like it in a section either by itself or together

with the 110(2) classroom exemption that would provide the means for programs to be recorded and kept and used.

Mr. PATTISON. I have no further questions.

Mr. KASTENMEIER. That concludes the presentation on the part of the public broadcasters and we appreciate your testimony this morning.

[Subsequent to the hearing the following letter was received for the record:]

JOINT COUNCIL ON EDUCATIONAL TELECOMMUNICATIONS,
Washington, D.C., July 10, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. KASTENMEIER: At its January 22, 1975 Board meeting, the members of the Joint Council on Educational Telecommunications discussed copyright revision legislation with particular reference to the amendments submitted by Senators Mathias (Senate Amendment No. 1815) and Bayh (Senate Amendment No. 1913). At that meeting, the Board, without dissent, directed me to write this letter for your consideration and for the record to express our support of both amendments.

As you know, the JCET was founded in 1950 as the Joint Committee on ETV to lead the effort to reserve channels for educational television. Our interest in such newer communications technologies as cable and satellites in no way diminishes our concern with instructional and public broadcasting.

In reference to Mr. Mathias' amendment, we believe that a system of compulsory licensing of copyrighted materials is both just and necessary if public radio and television are to fulfill the role which the Congress intended for them in the Public Broadcasting Act of 1967.

Commercial broadcasting provides neither model nor analogy by which public broadcasting's need for timely access to copyrighted materials can be measured. The widely varied fare which makes up the public broadcasting schedule taps a potentially limitless range of nondramatic literary and musical works, sound recordings and pictorial, graphic and sculptural works. Still more important, public radio and television are decentralized, grass roots, systems. The network programs seen on PBS are not produced by the network, but by public television stations and other agencies. National Public Radio leans heavily on its member stations for the production of its network-distributed programming.

Only a system of compulsory licensing can provide the hundreds of noncommercial radio and television stations with timely access to materials for local and network programs while, at the same time, assuring that copyright holders will be adequately and fairly recompensed.

In the matter of Mr. Bayh's amendment, the JCET holds that removal of arbitrary restrictions on the number and life of copies of instructional programs made by governmental bodies and other nonprofit organizations is necessary to provide a climate in which well-produced, educationally sound, instructional programs can flourish.

As we said in my testimony of July 31, 1973, to the Senate Subcommittee on Patents, Trademarks and Copyrights:

"All our experience testifies to the fact that instructional programming of the highest quality—particularly in television—requires substantial resources. Rather than rely on what their own limited resources can provide, school systems, state-wide agencies, and noncommercial broadcasters are coming together to form consortia to finance instructional series for their own use and for sharing with other educational groups. In order to achieve financing and recoup the substantial investments which are required for program series which are professionally produced under the guidance of educational experts in content and methodology, the programs must be available for widespread and prolonged use. Because instructional broadcasting—and particularly instructional television—is at last emerging from the cottage industry stage, we suggest that statutory limits upon the number of tape copies which may be made, or their useful life, are counterproductive."

The members of the Joint Council on Educational Telecommunications urge that these amendments be introduced in the current session and adopted as a part of H.R. 2223.

Thank you for the opportunity to express our views.

Sincerely,

FRANK W. NORWOOD,
Executive Secretary.

Attachment.

1974 JCET MEMBERSHIP

Agency for Instructional Television.
American Association for Higher Education.
American Association of Community and Junior Colleges.
American Association of School Administrators.
American Council on Education.
American Library Association.
Association for Educational Communications & Technology.
Corporation for Public Broadcasting.
Council of Chief State School Officers.
Great Plains National Instructional Television Library.
National Association of Educational Broadcasters.
National Catholic Educational Association.
National Education Association.
National Public Radio.
National University Extension Association.
Public Broadcasting Service.
Indiana Higher Education Telecommunication System.
New Jersey Public Broadcasting Authority.
Pennsylvania Public Television Network.
Southern Educational Communications Association.

Mr. KASTENMEIER. The Chair will call a recess because there is a second quorum on for a period of 10 minutes. We will reconvene at 11:40. Until that time, the subcommittee stands in recess.

[Quorum recess.]

Mr. KASTENMEIER. The hearing will come to order.

When we recessed we were about to call as witnesses opponents of the Mathias and Bayh amendments. Shortly other members, hopefully, will join us. I would like to call and to greet representing the American Society of Composers, Authors, and Publishers (ASCAP), general counsel, Mr. Bernard Korman. who has been with us before and his statement is joined in by SESAC and by the National Music Publishers Association.

I am pleased to greet, representing Broadcast Music, Inc., Mr. Edward M. Cramer, president and Mr. Edward W. Chapin, counsel to the organization.

Following these representatives of musical interests, I would like to greet the Association of American Publishers, Inc., Charles Lieb, counsel, and the Authors' League of America, Inc., Irwin Karp, counsel.

Mr. Karp has been before us many times and has testified on many issues. Also, I am told that we have here Mr. Townsend Hoopes, president of AAP, the Association of American Publishers, and Mr. Ivan R. Bender, Educational Media Producers Council and Mr. Jon Baumgarten on behalf of Macmillan Inc. and on behalf of Harcourt Brace Jovanovich.

Gentlemen, I guess you are outnumbered by your opponents. May I call first on Mr. Chapin?

TESTIMONY OF A PANEL COMPOSED OF WITNESSES OPPOSING THE LEGISLATION: EDWARD M. CRAMER, PRESIDENT, BROADCAST MUSIC, INC., ACCOMPANIED BY EDWARD W. CHAPIN, COUNSEL; CHARLES LIEB, COUNSEL, THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.; IRWIN KARP, COUNSEL, AUTHORS' LEAGUE OF AMERICA, INC.; AND BERNARD KORMAN, GENERAL COUNSEL, AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS (ASCAP)

Mr. CHAPIN. Mr. Korman will deliver statements. We will be prepared to answer any questions you may have. Also SESAC has read ASCAP's prepared statements to be submitted for the record on both the Mathias and Bayh proposed amendments and SESAC wishes to join in both statements.

Thank you.

Mr. KASTENMEIER. Your statement is duly noted and may I say that all statements heretofore submitted to the committee on behalf of those present at the witness table and on behalf of those organizations will be accepted and made part of the record without objection.

[The documents referred to follow:]

JOINT STATEMENT ON BEHALF OF: ASSOCIATION OF AMERICAN PUBLISHERS, INC.; THE AUTHORS LEAGUE OF AMERICA; EDUCATIONAL MEDIA PRODUCERS COUNCIL; HARCOURT BRACE JOVANOVICH, INC.; AND MACMILLAN, INC.

Mr. Chairman and members of the subcommittee, I am Charles H. Lieb, a member of the law firm of Paskus, Gordon & Hyman, New York City. My testimony today is offered on behalf of the Association of American Publishers, Inc., for whom I am copyright counsel, and for the Authors League of America represented by its counsel, Irwin Karp; The Educational Media Producers Council represented by Ivan Bender; and Harcourt Brace Jovanovich, Inc., and Macmillan, Inc., represented by Jon Baumgarten of the law firm of Linden & Deutsch. These are the parties who create, license, sell and derive income from much of the work printed, recorded and in audiovisual form, which would be affected by the proposed amendment. Mr. Hoopes, president of the Association of American Publishers, Mr. Hoffman, chairman of its copyright committee and Messrs. Karp, Bender and Baumgarten are with me and will be glad, as will I, to answer your questions.

We oppose the request of educational and broadcasting organizations for the substitution of a new and drastically different section 112(b) for that presently contained in H.R. 2223. Indeed we think that that section, as now written, is overly generous and should be revised to accord with the twelve copy and five year limitations of your 1973 Bill; H.R. 8186.

Section 112(b) of H.R. 2223 presently reads as follows:

(b) Notwithstanding the provisions of section 106, [Exclusive Rights in Copyrighted Works] it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) [referred to below] or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display, if—

(1) no further copies or phonorecords are reproduced from the copies of phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

Section 110(2) provides in substance that the broadcast of a performance of a nondramatic literary or musical work or of a display of a work is not an infringement if:

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for:

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment.

The substitute section 112(b) as proposed by the educational and broadcasting organizations, would read:

Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work under section 110(2) or 114(a) to make copies of a particular transmission program embodying the performance and display, and to distribute such copies for transmission by or through other governmental bodies or nonprofit organizations.

The differences between Section 112(b) as now written and as proposed are:

(i) The prohibition against making more than 30 copies would be *eliminated*; thus permitting the making of an unlimited number of copies.

(ii) The requirement that all copies except an archival copy be destroyed within 7 years from the date the transmission program was first transmitted would be *eliminated*; thus permitting the copies to be kept, used and reused over an indefinite period.

(iii) The authority to "distribute—copies for transmission by or through other governmental bodies or non-profit organizations" would be *added*; thus permitting the distribution to and the broadcast of programs by other governmental or non-profit organizations, and indeed, even without requiring that the later transmissions be a regular part of systematic instructional activities and be otherwise subject to the requirements of section 110.

We think the suggested substitute for section 112(b) is unwise and unfair. In the long run, it would impede the development and distribution of instructional material and therefore would injure rather than aid the cause of education.

We will elaborate on the principal reasons for our opposition.

1. *The amendment would distort your Committee's original purpose to protect "ephemeral" recordings.*

Ephemeral (meaning lasting for a brief time, or short-lived or sharply limited in duration) recording rights appeared for the first time in the 1965 House Bill, H.R. 4347. Mindful of the ephemeral concept, your Committee would have permitted only one copy to be made of a performance and would have required that it be destroyed in 6 months time unless preserved for archival purpose only.

The 1967 bill, H.R. 2512, represented in your Committee's words a liberalization of the ephemeral recording privilege, but in your report (Report 90–83) you emphasized that the section was "still firmly based on the traditional concept of ephemeral recording as mere *technical adjuncts* of broadcasting that have no *appreciable effect* on the copyright owner's *rights* or *market* for copies or phonorecords". (P. 60, emphasis added). Under the section as drafted in 1967, a nonprofit organization which could transmit a work under the instructional broadcasting exemption of section 110(2) would be free to make *two* copies and to use them for transmitting purposes for *one year*. Moreover, under that section the ephemeral recording could not have been used in a transmission covering a geographic area having a radius of more than 100 miles.

Those limitations were removed from the 1967 bill by a floor amendment which was adopted without debate and without opportunity for authors and publishers to explain why the limitations on the recording privilege were fair and necessary.

The 1969 Senate bill and the corresponding House bill would have permitted twelve recordings, for use over a five year period, and this was increased to thirty copies and a seven year period in the 1974 and the current Senate and House bills.

We thought the 12 copy—5 year limits were too broad, but withheld our objection—hoping that accommodation could produce agreement on an acceptable bill. We think the 30 copy—7 year limitation is unwarranted and unreasonable.

The proposed amendment however would remove *all* limitations and bears no relation to ephemeral recordings. On the contrary, it would countenance the production and sale of broadcast recordings on a *continuing* and *permanent*, and *not* on an ephemeral basis.

The recordings which could be made and utilized under the proposed amendment would not be "short-lived" or "sharply limited in duration", nor can they be viewed as mere steps in the technical broadcast process. Instead, they would be independently existing works—objects of commerce in and of themselves—usable, reusable and copyable without limitation—produced by well-paid professional program developers.

2. *The amendment would stunt private sector development of educational materials.*

Section 110(2), generally speaking, permits a governmental body or nonprofit educational institution to broadcast copyrighted nondramatic material without the copyright proprietor's consent and without payment, provided that the program is made a part of systematic instructional activities and is made primarily for classroom reception. This would be a serious invasion of the copyright owner's rights and markets, but up to now has been considered tolerable because of limitation on the number and the use of program recordings that might be made.

The amendment in conjunction with section 110(2) would remove all such limitations. If adopted, nonprofit and governmental organizations could preempt a literary work or educational material developed at great expense by private sector authors and publishers by *broadcasting* it under the provisions of section 110(2), and by *recording* and *selling* or otherwise distributing it in unlimited wholesale quantities to an unlimited number of other nonprofit or governmental organizations.

Authors could be severely injured by such a broad privilege to broadcast copyrighted works without consent or compensation. The impact of "live" broadcasts as permitted by section 110(2) is serious enough, but to eliminate the ephemeral nature of the broadcast by granting an unlimited right to make and distribute recordings of the broadcast would infinitely compound the injury. Moreover, the educational publishing and audio-visual industries which produce materials intended for or adaptable to broadcast use would find it difficult to survive this kind of expropriation.

By permitting, without consent or agreement, the unlimited distribution of copies of instructional programs incorporating copyrighted works, the amendment would deprive producers of filmed educational material of a substantial part of their natural market. By increasing the audience for free broadcast use of literary works, the amendment would further attenuate that market. And by permitting the nonsequential showing of educational audiovisual materials, much of the value of the materials is lost to their creator and producer.

It was for these reasons that your Committee in 1967 said that it was not adopting changes, similar to those now proposed, which "could convert the ephemeral recording privilege into a damaging inroad upon the exclusive rights of reproduction and distribution." (Report 90–83, p. 60)

3. *The amendment would foster government control of curriculum material.*

If the private sector is to be "squeezed out" as a source for educational broadcast material the sole source will be government—either directly or through foundations and so-called "public" corporations. Thus we would have come full cycle—for in our effort to promote access to a diversity of literary material, we would have subjected literary works to monolithic government control.

4. *The amendment is unnecessary.*

Neither instructional broadcasting nor public education has any need for the broad exemptions from copyright which they now request, and your Committee and the Senate Judiciary Committee and the Register of Copyrights have so stated. The gradual enlargement of the exemption from the 1965 provision for a six month use of a single copy of a broadcast recording is outlined in OMNIBUS COPYRIGHT REVISION, COMPARATIVE ANALYSIS OF THE ISSUES published in August 1973 by Cambridge Research Institute. In discussing the revision bill then pending (12 copies for use over five years compared to 30 copies over 7 years in the present bill) the authors make the following comment:

"While it is undoubtedly true that they (the instructional broadcasters) would like unrestricted rights to make copies that the House-passed bill would give them, they also undoubtedly recognize that they do not need that broad an exemption." (P. 61)

There is neither need nor justification for the proposed amendment. We urge the Subcommittee to reject it and to retain section 112(b) as presently drafted,

but to reduce the limitations on copies from thirty to twelve and the use period from 7 years to five.

JOINT STATEMENT ON BEHALF OF: ASSOCIATION OF AMERICAN PUBLISHERS, THE AUTHORS LEAGUE OF AMERICA, EDUCATIONAL MEDIA PRODUCERS COUNCIL, HARCOURT BRACE JOVANOVICH, INC., MACMILLAN, INC. ON THE PROPOSED "PUBLIC BROADCASTING" AMENDMENT

Mr. Chairman, my name is Irwin Karp and I appear for The Authors League of America. Accompanying me are Townsend Hoopes, Alexander Hoffman and Charles Lieb, appearing for the Association of American Publishers; Ivan Bender, appearing for the Educational Media Producers Council; and Jon Baumgarten, of the law firm of Linden and Deutsch, appearing for Harcourt Brace Jovanovich, Inc., and Macmillan, Inc.

We oppose the demand by public broadcasting organizations for a compulsory licensing system which would empower public broadcasters and producers to expropriate books, poems and other literary works and use them on programs without the copyright owners' permission, at fees to be fixed by the Copyright Royalty Tribunal and distributed by the Copyright Office. The Amendment demanded by public broadcasters is the first effort to subject books and other literary works to expropriation by compulsory licensing. Because such arbitrary seizure of literary works would be so damaging and unfair to authors and publishers, we are submitting this joint statement to present the views of a substantial cross-section of this country's literary community.

The Authors League is the national society of professional writers and dramatists, with a membership of 6,500. The Association of American Publishers is an association of 260 firms which, in the aggregate, publish the vast majority of this country's books. Harcourt Brace Jovanovich, Inc. and Macmillan, Inc. are two of the largest American publishers and are not affiliated with the Association. The Educational Media Producers Council is an association of firms which produce audio-visual works for schools and other educational institutions.

I will summarize the joint statement, which we ask be included in the record; and my colleagues and I will be pleased to answer your questions.

1. THE PROPOSED AMENDMENT VERSUS VOLUNTARY ARRANGEMENTS

We assume public broadcasting spokesmen will ask your Subcommittee to adopt in substance the Amendment proposed last year by Senator Mathias (No. 1815). This was not included in the 1974 Senate Copyright Revision Bill and has not yet been introduced in the Senate this year. Senator McClellan's Subcommittee recently decided not to include the proposed Amendment in the 1975 Senate Bill and, instead, urged the parties to reach reasonable, voluntary accommodations for licensing the use of copyrighted works on public broadcasting programs. We submit for the record, a copy of the Subcommittee's statement.

As the statement indicates, meetings have been held by author/publisher and public broadcasting representatives, at the Subcommittee's suggestion, to work out voluntary licensing arrangements. Considerable progress has been made in developing voluntary procedures, discussed below, for simple and inexpensive licensing of literary works for use on public broadcasting programs. However, we were informed a few days ago that the Public Broadcasting System has decided to reject these reasonable voluntary accommodations and press their demand for a compulsory licensing system. Presumably the other public broadcasting organizations also will take that position.

In so doing, they are spurning both the request of Senator McClellan's Subcommittee and the recommendations made by the Corporation for Public Broadcasting's Advisory Council of National Organizations, in its March 1975 Report to the Corporation ("Public Broadcasting and Education"). In its report, the CPB's Advisory Council stated at page 37 and again at page 72 that the problem of clearing rights requires "cooperative action" and that the CPB should take the initiative in bringing the interested parties together to establish a "continuing mechanism" for clearances.

Author and publisher representatives are willing and ready to continue working with public broadcasting to establish voluntary licensing arrangements. And we are certain that our discussions with public broadcasting representatives will be resumed, and can achieve a reasonable voluntary accommodation if your Subcommittee rejects the demand that a compulsory licensing system be

written into the Copyright Revision Bill. Indeed, we are prepared to make the voluntary licensing system available even if public broadcasting representatives refuse to resume our joint negotiations.

2. THE SCOPE OF THE AMENDMENT

On its face, the Mathias Amendment appears to allow unlimited "public broadcasting" use of books, poetry and other non-dramatic literary works, including their adaptation as dramatic or documentary programs, and the reading of entire works or substantial portions. However, in a meeting with representatives of the Authors League, Senator Mathias stated that his amendment was not intended to permit the adaptation of literary works for dramatic, documentary or other public broadcasting programs; an interpretation he later confirmed in a letter to the Authors League. But the Senator indicated his amendment contemplated uses "in a more limited fashion"—apparently meaning the reading or recitation of an entire book, poem, short story or article, or of a substantial portion in excess of fair use. Public broadcasting spokesmen have told us and the Senate Subcommittee's staff that their interpretation coincides with the Senator's, and that their proposed compulsory licensing amendment was not intended to permit dramatization or adaptation of literary works.

3. OUR OPPOSITION TO A COMPULSORY LICENSE SYSTEM FOR READING, RECITATION OR DISPLAY OF LITERARY WORKS

As we advised Senator Mathias, the literary community is totally opposed to compulsory-license expropriation of literary works for reading or similar uses on public broadcasting, because it would cause serious damage and needlessly establish a dangerous precedent. In most instances, authors and publishers will license readings from their books, poems and other works on public broadcast programs for reasonable compensation. Indeed, such licenses are now granted for very modest fees, and often gratis. Moreover, many uses could be made without permission or payment, since they fall within the limits of fair use.

But there are occasions when an author or publisher would decline to permit a reading or similar use because of the serious economic or aesthetic damage it might cause. Compulsory licensing would deprive him of that fundamental right. And it would deny all authors and publishers the opportunity to negotiate reasonable compensation. Both consequences are discussed below.

There is no reason to inflict the regressive effects of compulsory licensing on authors of books, poetry, articles, and short stories, or their publishers. Licenses to use these works in public broadcasting programs can be obtained under voluntary arrangements at a lesser cost and administrative burden to all concerned, including broadcasters, than under the compulsory licensing system they demand. Our subsequent discussion demonstrates this. Furthermore, the regressive effects of compulsory licensing on authors and publishers would be compounded as public broadcasting continues to grow, to increase its resources, and to expand its use of non-dramatic literary works.

4. THE NATURE OF PUBLIC BROADCASTING

(i) The proposed compulsory licensing amendment would apply primarily to "public broadcasting" programs. Under Sec. 110(2) of the Copyright Revision Bill, an "instructional program" is one that forms part of an educational institution's or government body's "systematic instructional activities". Most of the late afternoon and evening programs on public broadcasting stations—e.g. New York's WNET and Washington's WETA—are not "instructional programs" under Sec. 110(2). In other words, such "public broadcasting" programs as "Feeling Good", "Nova", "Theater in America", "Wall Street Week", "Washington Week in Review", "Firing Line" and "Book Beat" are not "instructional programs"; they are not exempt from copyright under Sec. 110(2). But the producers and broadcasters of such programs would be empowered to expropriate literary works for the programs under the compulsory licensing system demanded by public broadcasters.

(ii) As the Senate Judiciary Committees report noted, "the programming of public television includes an increasing emphasis on programs of an entertainment or general culture nature. . ." (S. Rept. 93-983, p. 128). The Register of Copyrights noted that "as a medium for entertainment, recreation and com-

munication of information" much of this programming "indistinguishable from a good deal of commercial programming." (H. Rept. 93–83, p. 42).

(iii) In his comments, made several years ago, the Register also noted "the large audiences (such programming) is now reaching, (and) the vast potential audiences that are awaiting it." (*ibid*) Indeed, much of public broadcasting's programming is aimed, no less than commercial stations, at building and reaching large audiences. The MONTY PYTHON show and UPSTAIRS-DOWNSTAIRS are not classroom instruction; they were bought by U.S. public broadcasters at substantial prices because they would "sell to audiences."

(iv) Public broadcasters and producers spend large sums of money to create many of their programs. According to its 1974 Annual report, the Corporation for Public Broadcasting distributed $48 million dollars in grants and awards in that fiscal year. Large sums also were received from giant foundations, business corporations and other public sources. The total program cost of the series FEELING GOOD was $7.1 million, the Report tells us, for 26 segments; and it informs us that the total cost of THEATER IN AMERICA was $2.4 million, for NOVA $1.03 million (p. 8).

(v) Several programs are heavily financed by large business corporations who act like *sponsors*, and derive the same benefits they obtain from underwriting (i.e. "sponsoring") commercial television and radio programs [See Par. 4 (iii)].

(vi) Public television and radio do not broadcast the work of amateurs. Their programs are created and produced by professionals—executives, directors, producers, writers, actors and technicians who are well paid for their services. For example, the elaborate production facilities and headquarters of National Public Radio, vastly out-stripping those of most commercial radio stations, are operated by a large staff of well-compensated professionals.

(vii) As is indicated below, public broadcasting *negotiates on a voluntary basis* for the services of its employees, including those who create program materials; for the programs it leases from domestic and foreign television producers; for the films it leases from motion picture companies; and for the myriad of other facilities, goods and services it requires.

(viii) Public broadcasting copyrights its programs and exploits them in many marketplaces; e.g. it distributes tapes and film recordings for non-theatrical exhibition, for cable origination and for foreign broadcasting; it sells cassette recordings of radio programs.

5. THE SCOPE OF THE "NOT-FOR-PROFIT" EXEMPTION IN THE PRESENT COPYRIGHT LAW

Proponents of the Mathias Amendment argue that public television and radio enjoy a blanket "not-for-profit" exemption under the present Copyright Act which permits them to use books and other non-dramatic literary works without permission or payment. This is not the case.

(i) The "not-for-profit" limitation on the author's right to read or deliver his work [Sec. 1(c)] dates back to 1909 when a *live* reading might reach an audience of a few hundred, at most, in an auditorium or lecture hall. No one foresaw that a *live* reading could reach an audience of hundreds of thousands or millions if done on public television or radio stations, or networks.

(ii) The present Copyright Act does not impose a "not-for-profit" limitation on the author's right to make a recording or transcription of his book or other literary work, by which it may be delivered or presented. His permission and compensation are required, whether the recording is made by a "for-profit" or "not-for-profit" organization. Most of the material broadcast by public stations consists of recorded programs. And for the most part, such a recording is not the transcription of a live program created by the station—placed on tape simply to permit its broadcast at a later time. On the contrary, the vast majority of these recorded programs are created by production centers, individual stations or independent producers for distribution to many public broadcast stations. They are created by one production entity for future broadcast by many other stations just as motion picture companies or independent commercial television producers produce on film or tape such recorded works as motion pictures, television series, television documentaries, game shows and other "recordings"—for syndication to independent commercial stations, sale or lease to the three commercial networks, and for dissemination to public and instructional broadcasting stations.

Authors and publishers believe that both the letter and spirit of the present Copyright Act require that their permission must be obtained now to make use of their works in such recorded programs. And public and instructional broadcasting producers do request and receive these permissions, voluntarily, at very modest fees.

(iii) It is highly doubtful that some public broadcasting stations, and many programs, qualify as "non-profit" for the purpose of those provisions of Sec. 1 which are subject to a "not-for-profit" limitation. Many programs are heavily financed by business concerns who act like "sponsors", and derive the same benefits they obtain from underwriting (i.e., sponsoring) commercial television and radio programs. EXXON, MOBIL, XEROX, IBM and other industrial giants make no secret of their financing of public broadcast programs. In addition to "credits" on the programs, they purchase newspaper advertising announcing their financial support, so the public will know it should be grateful to them for the programs. This, as *Newsweek* has noted, is the earliest and still one of the most effective forms of broadcast advertising. It wins the good will of potential customers without alienating some of them as "hard-sell" commercial would (NEWSWEEK, Dec. 2, 1974; p. 92). As to the effect of sponsorship on the not-for-profit limitation, see: *Associated Music Publishers, Inc.* v. *Debs Memorial Radio Fund, Inc.* 141 F. 2d 852 (2d Cir. 1944); *Rohauer* v. *Killiam Shows, Inc., et al.* 379 F. Supp. 723 (SDNY, 1974).

(iv) Elimination of the "not-for-profit" exemption for a live reading of a literary work on public television or radio is not, therefore, the drastic change which some Mathias-amendment proponents claim. Thus, the House of Representatives and the Senate have approved the change, as did the Copyright Office. It should also be stressed that Sections 1(b) and 7 of the present Copyright Law now prevent any public broadcaster from dramatizing a literary work or adapting it into a television documentary or other program.

6. AUTHORS WILL BE THE VICTIMS OF COMPULSORY LICENSING

Most established authors of novels, poetry, biographies, current histories and other works of general interest own the rights to use their books in television, radio and motion pictures and receive all the income from such uses. Even where the publisher is authorized to license these rights, most of the income is paid to the author. So far as these types of books are concerned, authors rather than publishers would be the principal victims of a compulsory licensing system for literary works.

7. UNAUTHORIZED USES UNDER COMPULSORY LICENSING WOULD SERIOUSLY INJURE AUTHORS AND PUBLISHERS

Even public broadcasting spokesmen have recognized that unauthorized dramatizations, or adaptations of books on documentary programs, could inflict great economic damage on authors and publishers. Such expropriations, or the possibility of them, would prevent authors and publishers from licensing their books for use by commercial broadcasters or motion picture companies. For this reason Senator Mathias stated, and public broadcasting spokesmen conceded, that his proposed amendment would not permit expropriation of books for purposes of dramatization or adaptation.

The unauthorized reading of an entire literary work, or substantial portion of it, under a compulsory license also can be damaging. Thus while most authors might voluntarily license such uses for public broadcasting, there will be occasions when a writer will decline to grant a license—exercising his basic right to decide whether and when particular uses of his work should be made. Unauthorized readings of a novel to large public radio or television audiences may prevent the author from licensing its use to commercial television or motion picture producers. Unauthorized repeated broadcasts of the reading of a children's book on public stations may destroy the author's opportunity to license its use in commercial records or audio-visual productions.

If the reading of a particular book may increase the sale of copies (an assumption public broadcast spokesmen frequently make), the copyright owner will take that into account, and grant the license. But he is entitled to decide what the effects may be in particular circumstances. Not only may other commercial uses be prevented; the broadcasts of readings of some books also may inhibit the sale of copies. For example, the reading of an entire mystery novel, including its solution, to public radio listeners will decrease its sales to that audience.

Moreover, a compulsory licensing system would deprive the author of his fundamental right to protect his reputation and the integrity of his work from the injury a misuse or inappropriate use would cause. The author may believe that the producer who intends to expropriate his work under a compulsory licensing system is an incompetent who will mangle it; or that a particular use will distort it; or even, as is sometimes the case, that a particular work will suffer in oral

delivery. A compulsory licensing system would deny him the right to protect his reputation or work against such injuries by declining to authorize the particular use.

8. COMPULSORY LICENSING WOULD DENY COPYRIGHT OWNERS REASONABLE COMPENSATION FOR PUBLIC BROADCASTING USES

Licenses are now being granted voluntarily by some authors and publishers for the reading of their literary works on public broadcast programs—at reasonable, and often exceedingly modest, fees. Given the hundreds of thousands of works which public broadcasting can draw on, and the past experience of comparable license arrangements in publishing, it is clear that such fees would continue to be set at reasonable and modest levels by voluntary arrangements. Compulsory licensing would have a different and damaging consequence to authors and publishers. Its effect, and indeed the likely objective of its proponents, was stated by the Public Broadcasting System: "public broadcasting royalty payments must be held within low budgetary constrictions." (PBS Comments on the Mathias Amendment, to Senator McClellan's Subcommittee; 1975; p. 7). The answer to this objective was given by the Senate Judiciary Committee, when it noted that while public broadcasting stations "may deserve greater financial assistance, [but] they should not be subsidized by this country's creative talent." (S. Rept. 93–983, p. 128)

A Tribunal or other mass-licensing system cannot establish fair rates for broadcasting uses of books, poetry or other literary works. The economic situation is drastically different from that involved in licensing the performance of music. For one thing, a successful musical composition will be performed repeatedly in the same or different renditions without diminishing its appeal to the same audiences; and the composer and publisher are compensated on the basis of the number of performances. A broadcast audience will not listen to repeated readings of the same book. Moreover, the value of broadcast rights for different books and poems vary more widely than do the value of broadcast rights for musical compositions. The reading of verses from a book for young children cannot be equated, on an arbitrary time-fee basis, with the reading of a successful novel or the poems of a Nobel Prize winner.

A compulsory license/royalty tribunal system is too inflexible to establish for all books, poetry, articles and other literary works reasonable royalties that would take account of significant differences in: the success and value of individual works, author's standing and reputation, types of programs, production budgets and degree of "sponsorship", and kinds of uses. Such a system would lower the author's or publisher's remuneration for extensive use of a valuable literary work on a high-budget public program to the lowest common denominator of fees for much less valuable works used casually on inexpensive programs.

Moreover, the high dual costs of administering the Tribunal's rate-fixing activities and the Copyright Office's distribution functions would drastically reduce or eliminate the compensation paid to the author or publisher under the compulsory licensing system. Finally, the system would deprive the author and publisher of the fundamental right to decline a license if voluntary negotiations do not produce a fee he deems reasonable.

9. PUBLIC BROADCASTING DOES NOT NEED COMPULSORY LICENSING IN ORDER TO CREATE PROGRAMS

Nothing in the Copyright Act or Revision Bill prevents any public broadcaster or producer from creating and broadcasting a program on the same subject matter that is dealt with in a copyrighted book or other literary work. He is free to use the same sources, narrate the same facts and describe the same events reported in the copyrighted work. All the copyright does is prohibit the public broadcaster, or anyone else, from substantially copying the author's expression of the material rather than independently creating his own script.

Moreover, public broadcasters have the privilege of quoting, i.e. reading or reciting, excerpts from any copyrighted work under the doctrine of fair use, without permission or payment. A substantial proportion of the uses public broadcasters might make of literary works fall within the doctrine, and thus furnish no justification for inflicting a compulsory-license system of expropriation on authors and publishers. In our meetings with public broadcasters in recent weeks, we offered to discuss the formulation of guidelines for fair use, and we are ready and willing to continue that discussion.

10. PUBLIC BROADCASTING CAN FUNCTION EFFECTIVELY UNDER VOLUNTARY LICENSING ARRANGEMENTS

Public broadcasting spokesmen point to alleged "difficulties" in obtaining voluntary licenses as a principal justification for imposing a compulsory licensing system on authors and publishers of literary works. The "difficulties" are grossly exaggerated; and inconveniences that may occur occasionally can be avoided under voluntary arrangements, by simple procedures which we have been discussing with public broadcasting representatives [see (iii), below].

(*i*) *Public Broadcasting's Experience With Voluntary Licensing*

Licenses to read from books, poetry, etc. would hardly constitute a significant part of public broadcasting's licensing activities. In our discussions, one of the public broadcasting spokesmen mentioned that programs using such material probably constituted a very minor portion of all public television programs. By contrast, the operations of public broadcast stations and producers depend on the contracts they negotiate with officers and executives; commentators, performers and announcers; producers, directors and script writers; cameramen, film editors and artists; musicians and electricians; stagehands, janitors and other help; and the unions representing some of them. All of these agreements are negotiated on a voluntary basis. No compulsory license system compels these people to make their services available to public broadcasting, at salaries fixed by a "tribunal" without their consent.

Much of public broadcasting's programming consists of original material created for it by its script writers, directors and producers—working under arrangements negotiated voluntarily. The Mathias Amendment would not conscript their creative service. In addition, public broadcasters negotiate voluntary licenses to broadcast motion pictures, plays, programs produced by independent domestic producers, and television and radio programs produced by foreign broadcasters. The Mathias Amendment would not expropriate any of these copyrighted works, which constitute a large proportion of U.S. public broadcasting's programming. It would not subject them to compulsory licensing. It should not. The point is that public broadcasting can and does obtain most of its program materials by voluntary arrangements and licenses. It can and should use voluntary arrangements when it seeks to use material from copyrighted books and other literary works.

In this connection it should be remembered that some of the most successful programs broadcast by U.S. public broadcasting stations are produced by the British Broadcasting Corporation, a very public, non-profit entity, and by other British producers. Indeed the major programs on U.S. public television based on literary works were produced by these British organizations which obtain the rights from authors and publishers by voluntary arrangements, not by a compulsory-license system of expropriation.

(*ii*) *What a "License" is*

A license to read a book, or portion of it, on a public broadcast program is not a contract drawn separately for each use. The license usually is a short printed form which contains all the terms. The station or producer simply inserts designated information to identify the material to be used and the type of program use to be made. As is the case with thousands of comparable licenses used for decades in publishing, this is done by laymen, not lawyers or "experts". Publishers and authors' agents have prepared such forms for various types of broadcasting uses, and some public broadcasters and producers also have prepared them.

(*iii*) *Use of a Recommended Standard Form*

Representatives of authors, publishers and public broadcasters—some of whom are appearing here today—have been holding a series of discussions to work out voluntary arrangements to further simplify and expedite the licensing procedure. A principal component would be the use of a recommended, standard license form. We have spent many hours working on this. Both sides have drafted and re-drafted a proposed form, and discussed it at length in our meetings. It is fair to say that both sides are close to agreement on the document. This form would eliminate a primary source of delays and confusion, which public broadcasting spokesmen are wont to characterize as "difficulties." In large part, these are simply due to inadequate information. A station requesting a license, often by

letter, may omit such data as the title of the book, the author's name or the pages to be used. This causes time-consuming rounds of correspondence.

The recommended standard license form would eliminate such delays. The form would be made available for use by all public broadcasters and producers, publishers, authors and their agents. The information required to complete the license is clearly called for on the form. Everyone involved would know what data was required and where it should be placed. Everyone would know where each provision of the license appeared, and what it means.

(*iv*) *Public Broadcasting Employees are Capable of Preparing License Requests*

Public broadcasting spokesmen have argued that the preparation of license requests is too difficult for employees of their stations to cope with. This is not so.

(1) Similar licenses have been employed in publishing for many decades to obtain permission to quote extensive portions of copyrighted works in other books, text books, anthologies and periodicals. Countless individual authors have obtained these licenses to reprint other people's copyrighted material in books they are writing or anthologies they are editing. They complete these forms, send them off to the copyright proprietors and secure licenses without the benefit of counsel of a staff of employees. Their resources are much more limited than those of the smallest public broadcasting station. But resources are not required.

(2) Many public broadcasters and producers are large organizations which are easily able to prepare and process these simple licenses. It is unbecoming for a station like New York's WNET, which is receiving $3 million to produce one series of programs (NY TIMES, 6.13.75,p.74), to argue it cannot afford the minimal time and effort required to have an employee fill in a few blank spaces on a standard license form when the station wishes to use material from an author's book in a program.

(3) Even the smallest public broadcasting stations receive many of their programs and many services from centralized organizations. The Public Broadcasting Service, for example, "distributes programming, assists the stations in the acquisition of programs . . . (and) assists the stations by suppying a variety of materials . . ." [Public Broadcasting System Comments to Sen. McClellan, cited supra, p. 1]. As the Corporation for Public Broadcasting stated in its Annual Report for 1974, the Public Broadcasting Service is a "source of member (station) services"; and in fiscal year 1974, the Corporation paid Public Broadcasting Service "slightly over $8 million for these services." (p. 9) National Public Radio performs similar services for its member public radio broadcasters.

These powerful organizations, with little effort, could assist even the smallest station adjust to the minimal routine involved in completing and mailing the standard license form for those of its own programs which might require permission from an author or publisher. It should be emphasized that the station would not have to seek permission for any program, using copyrighted literary material, which it received from PBS or similar sources. PBS, or the large organization or station which produced the program, would obtain a license that covered broadcasts of the program by all public broadcasting stations.

(*v*) *Establishment of an "Expediting Office"*

When delays occur in securing a license, they are usually due to such minor causes as the user's failure to provide an item of information (e.g. the book's title), not mailing the form to the proper address, or oversight in a publisher's office. The standard recommended license form would eliminate most of these occasional delays. Clear instructions from Public Broadcasting Service and National Public Radio to their member stations would eliminate others. In addition, the Association of American Publishers has agreed, within the framework of a voluntary licensing arrangement accepted by copyright owners and public broadcasters, to establish and operate an "Expediting Office". This office would check on delays in processing individual requests for licenses, help resolve snags, and provide information to public broadcasting stations and producers. Actually they will need little help in adjusting to using the recommended standard form. But the Expediting Office would be there to provide assistance, when needed.

11. VOLUNTARY LICENSING ARRANGEMENTS WILL BE LESS COSTLY AND LESS BURDENSOME THAN A COMPULSORY LICENSING SYSTEM

If a compulsory licensing system were established, someone would have to pay (1) the considerable costs incurred by the Copyright Royalty Tribunal in the continuing and difficult task of fixing royalties for broadcasting uses of literary works; and (2) the formidable costs that would be incurred by the Copyright Office in distributing royalties to countless individual authors for various broadcast uses of their works. Its spokesmen assume none of these dual costs will be borne by public broadcasting. But the system would be just as costly if the taxpayers have to support it. And it would be utterly unfair if authors and publishers were compelled to pay the high, dual costs of expropriating their own property—by deducting them from royalties and thus diminishing even further their compensation for these unauthorized uses of their books, poetry and other works.

Public broadcasting spokesmen also assume that a compulsory licensing system will not impose an administrative burden and expense on their stations and producers. This is not so; indeed, the burden and expense would probably exceed those incurred under voluntary arrangements. Stations and producers would have to file reports of every use of every copyrighted literary work, giving a complete identification and describing the type of use made. Otherwise, authors and publishers would have no way of knowing when their works had been used, and would be denied the information needed to determine which compulsory license royalty applied to each particular type of use. Without this information, individual authors and publishers would effectively be denied compensation. Without the information, the Copyright Office could not perform the complex task of distributing royalties to the individuals entitled to receive them. Since public broadcasting would have to participate in rate-fixing proceedings and appeals, it would have additional heavy costs to bear.

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13. VOLUNTARY LICENSING WILL PROVIDE PUBLIC BROADCASTING WITH AMPLE "ACCESS" TO LITERARY WORKS

(i) The Author's Right of Refusal

Public broadcasters argue that compulsory licensing is needed to assure them "access" to literary works. By "access" they mean the privilege of using any work, any time they ask for it. They complain that voluntary arrangements would not guarantee them that every author or publisher would grant a license each time it is requested. This 100% certainty is a luxury they do without in every other aspect of their operations. As we have noted, there are reasons why an author or publisher, under certain circumstances, will decline to grant a license—to protect his or his work's integrity, or his economic interests. His right to refuse permission for a particular use of his work is one of the fundamental rights granted by copyright—indeed, it is the essence of copyright, and of every other form of property.

But public broadcasters' concern over occasional refusals of licenses is totally unrealistic. They have, and will continue to have, available for use an infinite supply of literary works—exceeding by many, many times even their most ambitious demands for it. There are now several hundred thousand copyrighted books in print, plus countless copyrighted poems, articles and other individual works. More than 30,000 new books are published annually in this country; several times that number are published abroad. To this enormous mass, add the hundreds of thousands of books, and the incalculable number of poems, that have already fallen into the public domain. With this vast, almost infinite, reservoir of literary material, it requires a special sense of insecurity to worry that if one author, on one occasion, refuses a license—a producer will be unable to find another work to read or recite. If further security is required, it should be remembered that frequently the use intended will fall, or could be brought within, the boundaries of fair use—so that no permission or payment would be required.

(ii) The time element

One gets the impression from public broadcast spokesmen that programs are written on Monday and produced on Tuesday, leaving no time to secure permissions. Not true. All of public broadcasting's television programs and much of

its radio programming are recorded, and very little that would use readings from literary material is not planned in advance. Voluntary licenses for such programs are secured now. One of the problems that authors and publishers have confronted is the long delay that occurs between the granting of the license and the ultimate production of the program, if indeed the program is ever produced or ever uses the work for which the license was granted. There is ample time to secure licenses, delays can be avoided, and licenses could even be cleared, when necessary, by using the telephone.

(*iii*) *Price*

As we have indicated, one of public television's primary motives in seeking compulsory licensing may well be the hope of expropriating authors' works at lower prices than would be reached in voluntary arrangements. Also, they have expressed the fear that some authors and publishers would demand excessive prices. Here again they are victims of a strange and unrealistic need for absolute security. Public television is able to cope with all of its other costs—for outside programming, talent, labor, supplies and equipment—without the umbrella of compulsory licensing.

The record thus far is that authors and publishers have been extremely reasonable in the fees they have charged public broadcasters for literary material. Many licenses have been granted for fees of $25, $50 and $100. Frequently permissions have been granted to make uses in excess of fair use, without any charge. But under a voluntary system, when a work of considerable value is sought for a high-budget program, the author has the option of requesting a larger fee. Public broadcasting spokesmen have suggested that fees for all works, on all programs, and all budgets, be set at the same level. They see compulsory licensing as the means of holding all compensation for all uses to the same lowest common denominator—for the low budget children's program, or a multi-million dollar series underwritten by corporate sponsors like EXXON, MOBIL, XEROX and IBM.

There is no evidence that publishers and authors will be any less reasonable in the future than they have been in the past. Aside from their genuine desire to be helpful to public television (not likely to be preserved by a Mathias Amendment) there is the inexorable pressure of supply and demand. The huge reservoir of available literary material vastly exceeds needs. Fees are exceedingly modest now because the law of supply and demand does work in this area; with the continuing flow of new books, it is not likely to be repealed in the foreseeable future.

14. THE NEGOTIATIONS BETWEEN AUTHOR/PUBLISHER AND PUBLIC BROADCASTING REPRESENTATIVES

(*i*) *The Meetings Prior to June 18th*

At the suggestion of Senator McClellan's Subcommittee, author/publisher and public broadcasting representatives held four meetings to attempt to work out a voluntary reasonable accommodation; they also met jointly with the Subcommittee staff on three occasions. Considerable work was done, considerable progress was made. The representatives drafted and redrafted the recommended standard form of license for readings of nondramatic literary works on public broadcasting programs, and came close to agreement on the form.

Because we were preparing a voluntary recommended form, whose terms would not be frozen into a statute for decades, author/publisher representatives acceded to requests by public broadcasting spokesmen to include provision which go far beyond the scope of the Mathias Amendment. We would bitterly oppose their inclusion in a statutory licensing scheme since they can be exceedingly harmful in some circumstances, and may become even more dangerous in a short time. We were willing to include them in the recommended form because it is a voluntary arrangement—leaving each author and publisher free to decide whether to accept the provisions, or delete them from the license it grants.

As noted, other subjects were discussed at the meetings: (1) Provided agreement is reached with the broadcasters, the Association of American Publishers would establish an "expediting office" to facilitate the processing of licenses; (2) We offered to work with public broadcasting spokesmen on the development of fair-use guidelines.

(ii) The June 18 Meeting

At our fourth and most recent meeting, held on June 18th at the headquarters of National Public Radio, public broadcasting representatives told us they were awaiting instructions from their Boards of Directors on whether the recommended standard license form and the expediting office would be acceptable to their organizations. They told us there were 5 "open questions" for the Boards to consider: (1) that under a voluntary system, an author could decline to grant a license; (2) that public broadcasting stations could not use a literary work if its author or publisher did not reply to a license request; (3) that author/publisher representatives could not discuss a recommended fee schedule, or fix one that was binding on all copyright owners; (4) that author/publisher representatives would not agree that public broadcasting programs could use 100 words or less from any work without permission or payment, even though the 100 words might be the entire poem or other work, or a major portion, and its use would not be fair use under the particular circumstances involved; and (5) that author/publisher representatives would not agree to an arrangement that continued indefinitely, indeed perpetually.

As noted above (p. 3), the Public Broadcasting Service has decided to reject a voluntary arrangement with authors and publishers. Presumably the other broadcasting organizations have reached the same decision.

(iii) Our Response to the 5 "Open Questions"

Obviously the 5 "open questions" could not be answered in public broadcasting's favor under any voluntary arrangement. This must have been apparent to them from the outset, as it was to the Senate Subcommittee when it urged that a reasonable voluntary accommodation be worked out by both sides. The Authors League and Association of American Publishers cannot bind individual authors and publishers to grant every license requested, or agree for them that failure to respond to a request constitutes the grant of a license. If only for antitrust reasons, our organizations cannot negotiate recommended fees with the broadcasting organizations; and obviously cannot bind each author or publisher to accept specified fees. Nor can our organizations bind each author or publisher to grant the use of 100 words from a work without permission or payment. Nor should the authors of short poems and similar works be deprived of compensation under such a rule. On the other hand, guidelines complying with the principles of fair use would recognize the use of much longer excerpts, in various circumstances, as fair use.

The 5 "open questions" can only be answered in public broadcasting's favor under a statutory compulsory-licensing system. For the reasons discussed above, public broadcasting is not entitled to expropriate authors' and publishers' works under such a system. And as we have pointed out, public broadcasting can function effectively under voluntary licensing arrangements and obtain ample "access" to literary works.

(iv) The "Perpetual" Agreement

Public broadcasting representatives have contended that any agreement with author and publisher organizations must contain provisions to assure its continuation for some indefinite, perhaps perpetual, term. This argument underlies their 5th "open question." Such an open-ended or perpetual term is legally impossible; and, realistically, unnecessary. Public broadcasting spokesmen argue that if the Mathias amendment is not adopted, authors and publishers will have no incentive to use the recommended license form, maintain an expediting office or be cooperative in granting licenses.

We totally disagree. The threat of a Mathias-type amendment will be as potent a stimulus for authors and publishers five years from today as it is now. Indeed, if they scuttled a voluntary licensing arrangement negotiated now, the threat would be even greater. But there are better and more dignified reasons why a voluntary licensing arrangement would continue. It is as much in the author/publisher interest as in public broadcasting's interest to have a reasonable, standardized voluntary licensing system for these uses. Authors derive income from them, and are more likely to do so if the system works. The administrative cost to publishers (as well as broadcasters) is much less if the license form is standardized, if all requests are made on the same form, if everyone—on both

sides—is accustomed to dealing with it, and an expediting office function. Even assuming the Association of American Publishers ultimately closed the office, perhaps because it was no longer needed, the licensing system would continue to function. And the Public Broadcasting Service and National Public Radio could provide the minimal coordinating service that might be requested by their stations, just as these organizations provide other services to them.

(v) *Our readiness to continue the discussions*

We are prepared to resume discussions with the public broadcasting representatives whenever they wish to do so. We hope that the Directors of their organizations decide they should. But if their Directors conclude that public broadcasting should not resume that effort to achieve a reasonable voluntary accommodation, author and publisher representatives will complete the recommended standard license form themselves, working from the last draft which embodies many of public broadcasting's demands, and make this license form available for use by public broadcasters and producers, publishers, authors and agents.

15. SEC. 116—THE JUKE BOX CLAUSE

Public broadcasters incorrectly argue that this clause justifies the compulsory license system they seek. It does not. Sec. 116 deals only with the playing of musical recordings on juke boxes. It does not allow juke box owners to play records of books. It does not allow them to *produce* recordings of books, music or other works. It is narrowly limited to the performance of music on coin-operated phonograph machines; and even in that narrow context, it is recognized as an historical aberration.

16. SEC. 111—THE CATV CLAUSE

Public broadcasters also incorrectly argue that this clause justifies the compulsory license system they demand. It does not. Sec. 111 only applies when a CATV system receives an over-the-air broadcast and simultaneously relays it to the system's subscribers—in other words when the CATV system functions as an antenna. (See: The Supreme Court's *Fortnightly* and *Teleprompter* opinions) Sec. 111 does not authorize any CATV system to use a book or any other copyrighted work in *producing* a program; it does not authorize the system to use a recording of a book or other work to *originate* a broadcast of a program. If an author does not voluntarily license a television producer to use his book or other literary work on a television program, it will never reach a cable audience.

17. PUBLIC TELEVISION ORGANIZATIONS AND OFFICIALS SHOULD NOT BE GRANTED THE POWER OF EXPROPRIATING AN AUTHOR'S WORK

In the initial meeting called by the Senate Subcommittee staff on April 24th, the Register of Copyrights expressed her opposition to the adoption of any compulsory licensing system for the use of literary works on public broadcasting programs. She emphasized that this was a drastic departure from the established principles of copyright law, that it was unnecessary and unjustified, and that it would set a very dangerous precedent. We agree, for the reasons discussed in this statement.

STATEMENT OF NATIONAL MUSIC PUBLISHERS ASSOCIATION AND AMERICAN GUILD OF AUTHORS AND COMPOSERS REGARDING PROPOSED PUBLIC BROADCASTING AMENDMENTS TO H.R. 2223, THE COPYRIGHT REVISION BILL

The American Guild of Authors and Composers (AGAC) and the National Music Publishers Association (NMPA)—the creators and distributors of America's music who hold the copyrights under which are issued "synchronization" licenses (the right to record works in synchronization with visual images, rights which Professor Nimmer has stated unequivocally to be protected under the Copyright Act and which the development of the kinescope and video tape have made relevant to public television)—strongly urge the Congress to reject as unfair, unwarranted and unwise (A) the proposal for a two-level government-administered compulsory license of copyrighted musical compositions for all public broadcasters ("the Mathias Amendment," so termed because Senator Mathias offered such a proposal last year) and (B) the elimination of all limitations on the number of additional "ephemeral" recordings of copyrighted material

which public broadcasters can make for instructional purposes without any compensation to copyright holders ("the Bayh Amendment").

Our appreciation of this nation's cultural advancement has long caused both our organizations to applaud the success of public and instructional broadcasting, particularly public television. Public broadcasting has become a well-established part of our national broadcasting system, widely hailed for its quality entertainment, artistic, news, sports and other programs. Instructional broadcasting is an integral part of our educational system. Both raise and spend large sums of money and represent important markets for our works. We thus want public and instructional broadcasting to enjoy the widest possible access to the music we create. If it is true that they have budgetary problems, this does not detract from the economic needs of the authors and composers of music whose very livelihood depends upon income from negotiated uses of their works. We agree with the words of the Senate Judiciary Committee Report of last year: "Such stations may deserve great financial assistance, but they should not be subsidized by this country's creative talent." (S. Rept. 73–983, p. 128)

Our sympathy with the legitimate needs of instructional broadcasting is demonstrated in the concessions we have previously made in Sections 110(2) and the predecessors of 112(b). However, the amendments now under consideration go beyond any reasonable compromise. The Bayh Amendment removes all safeguards for the economic interests of authors, composers and publishers. The Mathias Amendment must be viewed in relation to the true nature of "public" broadcasting.

As stated several years ago by the Register of Copyrights:

"Fully acknowledging the unique public value of educational broadcasting and its need for financial support, we must also recognize the large public audiences it is now reaching, the vast potential audiences that are awaiting it, and the fact that, as a medium for entertainment, recreation, and communication of information, *a good deal of educational programing is indistinguishable from a good deal of commercial programing.* The time may come when many works will reach the public primarily through educational broadcasting. In terms of good education it is certainly true that the more people reached the better; but in terms of the author's rights it is equally true that the more people reached the more he should be compensated. It does not seem too much to ask that some of the money now going to support educational broadcasting activities be used to compensate authors and publishers whose works are essential to those activities." (See H. Rept. 90–83, p. 42, emphasis added)

Public broadcasting is not granted special privileges by the producers, directors, actors, electricians or landlords who provide them with services. No compulsory license enables public broadcasters to receive such services without negotiating for them, no statute enables them to call some services "ephemeral" and pay nothing for them, and no government tribunal fixes the rate of payment for these services (or, for that matter, fixes the rate of compensation received by the public broadcast stations themselves). Surely discrimination against the creators of American music cannot logically be written into a copyright law that is constitutionally intended to protect them merely out of consideration for such large corporate sponsors of public broadcasting as Mobil and Exxon who contribute tax-deductible dollars to advertise their generosity.

I. The Mathias Amendment

A. GOVERNMENT INTERVENTION IS UNNECESSARY

The composers and publishers of America's music are most desirous to grant all possible licenses to the large and growing market of public broadcasting, as we are with respect to all similar markets for our works, and no statute is required to compel us to do so. Such licenses have been routinely negotiated and granted as a matter of course since the earliest days of public broadcasting. Indeed the final sentence of subparagraph (a)(2) of the Mathias Amendment acknowledged the fact that royalty rates already can be and are negotiated between public broadcasters and copyright owners.

No information has come to our attention indicating that public broadcasters have been denied equal access on fair and reasonable terms to any and all the copyrighted musical material they have requested. We have heard of no obstacle to the regular granting of synchronization licenses to such broadcasters and have heard of no instance in which negotiations with our members broke down over the amount of the royalty which was to be paid under the universally recognized system of rewarding creativity. And we know of no reason why the same pro-

cedures and patterns by which thousands of musical licenses are negotiated and granted each year for use by commercial broadcasters, motion picture companies and others, large and small, national and local, cannot be applied with the same effectiveness to public broadcasting.

Senators Mathias and McClellan, however, constructively urged us to focus more intently on what could be done to facilitate the granting of synchronization licenses to public broadcasters. Senator McClellan, as Chairman of the Senate Judiciary Subcommittee on Copyright, brought the parties together a short time ago to find a solution other than a compulsory license to facilitate the availability of copyrighted works to public broadcasters. These meetings made possible discussions which, because of their Congressional auspices, enabled the participants for the first time to engage in discussions of possible blanket licensing arrangements which otherwise could not have taken place.

Already agreement has virtually been reached on a form for a blanket synchronization license for all public broadcasters covering a publisher's entire catalogue which we will undertake to send to each publisher with our recommendation for acceptance. When such licenses have been signed by those publishers whose catalogues cover the great bulk of the music desired by public broadcasting, the latter will simply write one check for each of the four copyright organizations involved, with no other administrative burden whatsoever other than the maintenance of usage files enabling those organizations to determine the apportionment of these revenues. Although agreement is still to be reached on the timing of any arbitration required and on interim fees, it is already clear that these forthcoming agreements will provide for (a) interim fees undoubtedly lower than those which a government tribunal under the Mathias amendment would find to be a fair and appropriate proportion of the public broadcaster's total cost of production, particularly if the government's own administrative costs are added to those fees; and thereafter (b) the perpetual establishment of fair fees by negotiation or, in the event of a failure to agree, by mandatory arbitration.

In short, from these meetings there is evolving for public broadcasting an innovative system of access to and payment for copyrighted music which is unprecedented in terms of its simplicity, speed and economy. Having participated in those meetings, we agree with the statement issued last month by the Subcommittee Chairman and all its members that "considerable progress has been made, and tentative understandings have been achieved on a number of issues," and that agreement on those issues still under discussion "also can be reached if the parties seek reasonable accommodations." We share the Subcommittee's interest "in obtaining a mutually satisfactory solution" and its "hope that a complete agreement will shortly be reached"; and we pledge our continued cooperation with these efforts. Indeed, further progress was made at a meeting as recent as Tuesday of this week. (The full statement of the Subcommittee is attached.)

Clearly such an approach is preferable to a new statute that would further diminish the free market in musical works by giving the Federal Government new authority as a price-fixer over an area otherwise subject to arms-length bargaining, and by giving the Federal Copyright Office an additional role as collector and distributor of royalties. No tribunal, however wise and impartial, can establish a rate for each work of music as fairly and economically as untrammeled negotiations between the two parties directly involved.

B. COMPULSORY LICENSING IS UNFAIR AND UNWORKABLE

The concept of compulsory licensing is anathema to the creative talent of this country. The holders of musical copyrights have been penalized by the statutory imposition of this approach since 1909 with respect to sound recordings, and are strongly opposed to its needless expansion. (It might be noted that the Register of Copyrights in his 1961 Report even called for the repeal of the compulsory license requirement for musical recordings as an exception, no longer needed, to "the fundamental principle of copyright that the author should have the exclusive right to exploit the market for his work.")

A compulsory license was deemed necessary in 1909 for sound recordings to prevent one piano-roll company from gaining a monopoly. It has now been deemed necessary as part of an agreement between all parties concerned with juke boxes because the economic base of that industry, previously exempted from all copyright liability, has historically depended solely upon its unobstructed access to copyrighted music. It has been deemed necessary for cable television in

order to initiate an equitable system of compensation in a situation where the courts ruled no compensation was due under existing law.

But no such compelling purpose has been alleged for the use of the compulsory license technique in this instance. No compulsory license is needed to prevent one public broadcaster from excluding all others, or to assure or commence either payment by public broadcasters to copyright holders or access on reasonable terms to their copyrighted material. No other compulsory license curbs, as the Mathias Amendment would curb, a *pre-existing* right of copyright proprietors to bargain freely in the marketplace. (Nor would any other compulsory license permit, as the Mathias Amendment's inclusion of unpublished works would permit, the public use of a copyrighted work before the creator of that work has even decided whether and in what form he wishes to make it public. Surely we have not come to the point in this country where a composer cannot create and copyright a work for his own satisfaction and then decide for personal or economic reasons to withhold it from the public. Still other hazy terminology in the Mathias Amendment could be interpreted to cover not only non-dramatic broadcasts of copyrighted music but also dramatic uses and even non-broadcast uses which are far beyond the scope intended for this Amendment by its own proponents.)

Surely it would be unthinkable to extend into public broadcasting this inevitably harsh and inequitable concept of compulsory government licenses and price-fixing in the absence of clear and convincing evidence of its absolute necessity. (The compulsion, it should be added, is all one way—the amendment would not enable an author to compel a public broadcaster to use his music.) Although one of the reasons offered in support of the Mathias approach was the administrative burden required if licenses are privately negotiated—a burden, of course, that will be virtually eliminated through the procedures now being negotiated by all the parties—it is clear that an even greater burden would be imposed on the public broadcaster by the Mathias Amendment's requirement that he maintain all necessary records for the Register of Copyrights and periodically produce documented rate-making data for the new tribunal (to say nothing of the additional burdens created for these Federal agencies). Indeed, given our industry's experience in developing licensing patterns, our willingness to use our best efforts to locate for any applicant the appropriate copyright owner, and the availability of The Harry Fox Agency, Inc. as a licensing agent for some 80% of all music publishers, the private enterprise course—under *either* the blanket licenses now being negotiated or the customary publisher-by-publisher pattern—should be substantially *less* administratively burdensome for the broadcasters than the public bureaucracy route.

Certainly the private parties directly involved can reach a rate decision more quickly than a federal tribunal, and achieve payment more efficiently than going through the Register of Copyrights as a middle-man. And given the minimal nature of those fees, it would be unconscionable to route them through the Register and thus require her under Sec. (a)(3)(B) to deduct her own administrative costs before distributing them. For the result would be either the virtual elimination of all compensation for the creator or the imposition of unnecessarily high fees for the public broadcaster.

In short, continuing cooperative efforts by both public broadcasters and copyright proprietors will resolve any remaining impediments to speedy clearance and licensing for even the smallest producer of public broadcast programming. Enactment of the Mathias Amendment will not save the public broadcasters money or time; it will not increase their access to copyrighted music; it will not decrease their administrative burden. It is not needed, justified or desirable, and should be promptly rejected by your Subcommittee.

II. The Bayh Amendment

The Bayh Amendment would remove all limitations from the right of educational broadcasters to make without payment supposedly "ephemeral" recordings for instructional purposes of those works they broadcast without license or compensation under Section 110(2).

"Ephemeral," according to every standard dictionary, means "lasting for a brief time, short-lived, sharply limited in duration." The traditional concept of ephemeral recordings, the House Judiciary Committee Report of 1967 pointed out, holds them to be

"Mere technical adjuncts of broadcasting that have *no appreciable effect* on the copyright owner's *rights* or *market* for copies or phono-records." (H. Rept. 90–83, p. 60, emphasis added)

The original proposal on ephemeral recordings in the general copyright revision bill of 1965 met this definition. It would have permitted those broadcasting organizations already lawfully entitled to transmit a copyrighted work to make (without being guilty of a copyright infringement) *one* copy or recording for their own transmission within *six months*, such copy thereafter to be either destroyed or preserved for archival purposes only. That was "ephemeral"; and as noted in both the 1967 House Judiciary Committee Report and the 1974 Senate Judiciary Committee Report on Copyright Law Revision, "The need for a *limited* exemption in these cases because of the practical exigencies of broadcasting has been generally recognized . . .". (H. Rept. 90–83, p. 59; S. Rept. 93–983, p. 135, emphasis added)

The House Judiciary Committee in 1967, after considering the testimony of educators and copyright proprietors, then permitted instructional broadcasters who pay no royalties for transmitting to classrooms and the like under Section 110(2) to make *two* coipes for transmission within a period of *one year*. That was still "ephemeral:" and indeed the House Report emphasized that it was unwilling to "convert the ephemeral recording privilege into a damaging inroad upon the exclusive rights of reproduction and distribution." (H. Rept. 90–82, p. 60) Instructional broadcasters wishing to make wider use of a work were, of course, to be free to negotiate appropriate compensation therefor with the copyright owners, who have always recognized the need for minimal fees for such uses. Unfortunately an amendment on the House floor that was adopted without debate eliminated all limitations.

The initial report of the Senate Judiciary Subcommittee on Patents, Trademarks and Copyrights in December 1969 increased the number to *twelve* and the period of retention to *five years*; and Section 112(b) of S. 1361, reported in July 1974, increased these limits still further to *thirty* copies for *seven* years and permitted educational broadcasters to exchange recordings for transmission. That Section 112(b), far from providing for "ephemeral" copies, would carve out a large new area of broadcasts from which copyright proprietors would be unable to receive compensation for their creative contribution. The Senate Report in fact noted the argument of the private enterprise producers of educational films that these recordings by instructional broadcasters "are in fact audiovisual works that often compete for exactly the same market . . . without paying any copyright royalties . . .". The Report concluded: "These arguments are persuasive and justify the placing of reasonable *limits* on the recording privilege." (S. Rept. 93–983, p. 137, emphasis added)

We respectfully suggest that the limits set forth in Section 112(b) go beyond what is reasonable or necessary. Once 30 copies have been distributed, it will be difficult for the original distributor—and impossible for the copyright proprietor—to police their use and prevent or collect for infringements. Indeed the House Judiciary Committee in 1967 regarded *two* copies and *one year* as "reasonable limits" in the very same context (H. Rept. 90–83, pp. 62–63). Such a loophole, while encouraging widespread unauthorized uses, would surely *not* encourage copyright holders to cooperate enthusiastically with public broadcasters.

Now the Bayh amendment, contradicting the language of both Reports, proposes to revoke all limits altogether, to deny to American authors, composers and publishers any compensation whatsoever in one of the important and rapidly growing markets for their work. (Indeed its language does not even clearly limit to instructional uses the transmissions made by those who would receive copies from the instructional broadcaster.)

As observed above, educational broadcasting is now a big business, raising and spending large sums for performers, producers, technicians, executives and others, none of whom are asked or expected to contribute their services. We have every desire to grant licenses to instructional broadcasters as we do to other audio-visual work producers for minimal fees; and, as a by-product of the current negotiations previously mentioned, agreement is in fact being reached with these broadcasters on a simple short form of a request and license for the non-broadcast usage of copyrighted music. There is nothing "ephemeral" about the recordings created under these provisions; nor are they mere technical adjuncts to the broadcasting process. They are *professionally created* permanent programs intended for wide use. We have no objection to an amend-

ment to the present statute permitting instructional telecasters to facilitate their task by making a very limited number of truly ephemeral copies. But it would be patently unfair for the Congress, by adopting the Bayh amendment or even Section 112(b) in its present form, to single out the creators of copyrighted works as the only participants in multiple instructional telecasts and rebroadcasts from unlicensed copies of their works who are uncompensated for their contribution.

Under Section 110 and a more limited Section 112, as well as under the doctrine of fair use, instructional broadcasters are already assured of ample free access to copyrighted works. We cannot believe the Congress will go further and in effect allow one substantial class of users to expropriate without compensation the property rights of this nation's creative talent.

Joint Statement of Chairman and Members of Senate Subcommittee on Patents, Trademarks, and Copyrights

The Senate Subcommittee on Patents, Trademarks, and Copyrights during the processing of the legislation for the general revision of the copyright law gave lengthy and detailed consideration to an amendment proposed by Senator Charles McC. Mathias, Jr., to establish a statutory compulsory license for the use of certain categories of copyrighted works by public broadcasting. The initiative taken by Senator Mathias has considerably improved the possibility of a satisfactory resolution of the copyright problems of public broadcasting.

At the request of the Chairman of the Subcommittee, representatives of public broadcasting and of the creators and owners of copyrighted material have been meeting to explore mechanisms other than a statutory compulsory license to facilitate availability of such material to public broadcasting. Representatives of the Chairman, of each member of the Subcommittee, and of Senator Mathias attended certain of these meetings.

The Subcommittee notes that considerable progress has been made, and tentative understandings have been achieved on a number of issues. Some issues remain in dispute but the Subcommittee believes that these also can be resolved if the parties seek reasonable accommodations. Consequently, the Subcommittee urges the parties on an urgent basis to continue with the negotiations.

The Subcommittee will maintain its interest in obtaining a mutually satisfactory solution. The Subcommittee expresses the hope that a complete agreement will shortly be reached.

Statement of American Society of Composers, Authors and Publishers

INTRODUCTION

ASCAP is opposed to the amendment proposed in the 93d Congress by Senator Charles McC. Mathias, Jr., to the copyright revision bill which would grant a compulsory license to public broadcasters (Amendment No. 1815 to S. 1361). The Senate Copyright Subcommittee recently reported S. 22, the general revision bill, to the Senate Judiciary Committee without the Mathias Amendment. Indeed, the Subcommittee voted unanimously against the Amendment. We urge this Committee to do the same.

Despite the length of the presentations you will hear today, the basic issue is really not complicated: that issue is whether public broadcasters are so different from commercial broadcasters and all other music users as to require a new and special marketing mechanism for clearing rights to music. We see no such need.

The proponents say they lack the time, money and expertise to deal successfully with numerous, widespread copyright owners. ASCAP was organized in 1914 to meet this very problem. We exist to provide a central clearing house through which each user may, under one license, perform all the works in our repertory.

This clearing house approach has worked well in the United States for more than 60 years. ASCAP's two activities, licensing and distribution of royalties are carried on under supervision of a Federal court. Users, ranging from the smallest tavern or local radio station to the largest national commercial television network, are assured of a bulk licensing mechanism at reasonable cost.

We perceive nothing about public broadcasting that sets it apart from all other users of copyrighted music, so as to require the compulsory license of the Mathias

Amendment. We think the present law requires public broadcasting to obtain licenses for nondramatic performances of copyrighted music. If there were any doubt, it would be removed by H.R. 2223 which eliminates the "for profit" limitation on the performance of nondramatic musical works contained in the present law. Section 106(4) grants the copyright owner the exclusive right "in the case of literary, musical, dramatic, and choreographic works, pantomime, motion pictures and other audiovisual works, to perform the copyrighted works publicly." As the Senate Report on S. 1361, 93d Cong., 2d Sess. (1974), states, the purpose is to require those who perform copyrighted works publicly to pay license fees:

"The line between commercial and 'nonprofit' organizations is increasingly difficult to draw. Many 'nonprofit' organizations are highly subsidized and capable of paying royalties and the widespread public exploitation of copyrighted works by educational broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad 'not for profit' exemption could not only hurt authors but could dry up their incentive to write." Sen. Rep. No. 93–983, 93d Cong., 2d Sess. (1974) 112.

Thus, the bill would require public broadcasting to negotiate for licenses in just the same way that all other music users do. However, the Mathias amendment would grant public broadcasters a *compulsory license* for the use of nondramatic literary and musical works, sound recordings and pictorial, graphic and sculptural works. The license fees for that compulsory license would be determined not by the usual negotiation between the parties, but by the Copyright Royalty Tribunal.

ASCAP is opposed in principle to any form of statutory compulsory license. The American tradition is to require a party seeking to use another's property to bargain with the property owner for such use. There is no reason to exempt public broadcasting from the American tradition. Indeed, public broadcasters rent their offices and studios in competition with other tenants; compete with other employers for their staffs and talent; and pay for all other services and property they use, in amounts fixed in the open market place. If public broadcasters wish to use the property of copyright owners, the fees should be negotiated.

Spokesmen for public broadcasting argue that they should be treated like jukebox operators and that their broadcast originations should be treated like the secondary transmissions of CATV operators:

"Public broadcasting is no less restricted than cable television and juke-box interests in its inability to control copyright use, nor more able to reach mutually satisfactory royalty arrangements with copyright owners." Comments of the Public Broadcasting Service on Amendment 1815 and Amendment 1831 to S. 22 (S. 1361) submitted to Senate Subcommittee, 1975 (hereinafter "PBS Comments"), at p. 15.

We think these spokesmen are wrong. The differences between the public broadcasters and the jukebox or CATV industries are plain.

The three compulsory licenses in the bill are present for historical reasons, none of which apply to public broadcasting. The compulsory license for mechanical recordings has existed since 1909; the jukebox and cable television industries—unlike public broadcasting—have generally been exempt from all copyright liability. Compulsory licenses for them are the result of carefully worked out compromises.

As to the claim of inability to reach an agreement, the fact is that since the PBS Comments were submitted to the Senate Subcommittee, agreement has virtually been reached.

The Mathias Amendment is therefore simply unnecessary.

We turn now to a description of the rights involved.

I. Public broadcasting requires licenses from copyright proprietors for "performance" and "synchronization" rights

Television broadcasts usually involve *two* separate copyright rights. The first is the "performance" right—the 1909 Copyright Act grants to the copyright owner the exclusive right to "perform" the work. These rights are generally granted on a blanket basis by the performing rights organizations, ASCAP, BMI and SESAC.

The second, the "synchronization" right, comes from the 1909 Copyright Act's grant to the copyright proprietor of the exclusive right to "record" his work. A synchronization license enables the licensee to record the copyrighted work in timed relation ("synchronization") with the visual image. Synchronization rights were originally granted to motion picture producers, and later to producers of television programs.

In the early days of commercial television, programs were either produced live (for which no synchronization license was required) or on a film called a "kinescope" (for which a synchronization license was required). The commercial television networks needed synchronization as well as performance licenses, and asked ASCAP to use its best efforts to secure synchronization licenses from its publisher members, for the normal single network use. ASCAP's members were willing to grant such licenses, free of charge. When a network wished to use the kinescope for a rerun, a fee was paid directly to the publisher. This procedure became standard industry practice.

Public broadcasters recognized that synchronization licenses were needed for lawful duplication of their programs. The 1909 Copyright Act does not impose a "for profit" limitation on the right to record. From at least the early 1960's they obtained synchronization licenses from individual copyright owners without any difficulty. But then, as their uses grew, they stopped requesting synchronization licenses apparently in reliance on an agreement reached in principle with ASCAP in 1967.

Public broadcasters have asserted that they are under no obligation to obtain performance licenses because, they say, their performances are not "for profit" within the meaning of the 1909 law. We disagree and have tried to reach an amicable resolution by negotiation. Finally, we are very close to agreement.

II. Negotiating with Public Broadcasting

Our negotiations with representatives of public broadcasting have been going on for a decade and are, finally, close to fruition.

The history is instructive. As we have pointed out, public broadcasting recognized the need to obtain synchronization licenses. NET alone was paying two publishers—Associated Music Publishers and Boosey & Hawkes—about $10,000 annually in synchronization fees by the mid-1960's. After preliminary talks with the National Association of Educational Broadcasters and the National Educational Television and Radio Center (NET) in 1965 and 1966, NET asked us in February, 1967, to use our best efforts to obtain synchronization licenses from our publisher members in much the same way these rights were obtained for the commercial networks. This was to be part of a performance agreement between NET and ASCAP. We agreed to do so and from that point on NET stopped obtaining synchronization licenses from our members—even though the agreement was never signed and NET never paid any fee to ASCAP.

ASCAP had proposed, and NET had agreed to accept, a three-year performing rights license at a token fee of $20,000 per year, which was less than what NET was paying for synchronization fees alone. But, discussions concerning the wording and details of the agreement dragged on for the next year and a half because public broadcasting sought worldwide audiovisual rights in addition to the rights needed for United States broadcast purposes. Despite the oral agreement between NET and ASCAP for the three-year term commencing May 1, 1968, no license agreement was signed, and no license fee was paid.

In July 1969, ASCAP again attempted to achieve a formal agreement with public broadcasting. The Corporation for Public Broadcasting (CPB) had been established and a national interconnected network inaugurated. Again, documents were exchanged but no license agreement was signed, nor any payment made. Meanwhile, public broadcasting had stopped obtaining synchronization licenses.

In the ensuing years, the structure of public broadcasting changed radically and the public broadcasting industry grew tremendously. NET was succeeded by the Public Broadcasting Service (PBS). Gross revenues of public broadcasting grew from about $100,000,000 in 1970 to $250,000,000 in 1974. Nevertheless, throughout this period, the public broadcasting industry did not pay any license fees to the authors, composers and publishers of copyrighted nondramatic musical works, whose property they were using in increasingly large quantity.

By October, 1973, the nature of the industry's programming had changed and included far more entertainment than it had previously. ASCAP again sought to negotiate a license arrangement through PBS and CPB. A February, 1974 meeting was scheduled and then called off by public broadcasting. We did not meet until July, 1974. In October, 1974, the negotiations resulted in an agreement in principle: Public broadcasting would pay ASCAP $150,000 per year for three years starting January 1, 1975, for its national programs only. As we do for the commercial networks, we agreed to use our best efforts to obtain free synchronization licenses from our publisher members. But public broadcasting desired much broader synchronization licenses than commercial broadcasters,

and a problem arose over additional rights—so-called audiovisual rights—which public broadcasting insisted on obtaining free if they were to make an agreement with us.

The agreement reached in principle in October, 1974 was not signed.

Knowing how close we were to an agreement, the staff of the Senate Subcommittee on Patents, Trademarks, and Copyrights called all parties together to discuss the proposed Mathias Agreement and possible alternatives to it. In the spring of this year, a series of meetings were held between representatives of authors, composers and publishers of music and public broadcasting, under the auspices of the Senate Subcommittee. Agreement was reached quickly on virtually all points of a five-year package at fees of $300,000 for the first two years, $400,000 for the next two years, and $500,000 for the last year. BMI believed these fees were somewhat low, but had agreed to the $500,000 annual figure and also indicated its willingness to reach an accommodation.

But the reason our current talks did not result in an agreement is that public broadcasting insisted on compulsory arbitration at the end of each license term—a provision which would effectively result in a compulsory license without the Mathias Amendment. We rejected this proposal as unjustified and unreasonable, particularly because we regard the figures discussed as experimental rather than as reasonable fees.

Public broadcasting claims to need compulsory arbitration to be assured that the license agreements will continue. No other user of copyrighted musical works requires such a provision. In ASCAP's experience, when negotiations fail to produce agreement by the end of a license term, the talks are continued and the license is extended. Our extension agreements routinely provide for retroactive adjustment when new terms are agreed on. We have furnished copies of our extension agreements to the representatives of public broadcasting.

The compulsory arbitration suggested is unsatisfactory because the experimental license fees we were willing to accept are based on public broadcasting's representations of what it can now afford. Those representations were accepted in an effort to reach an agreement but they do not reflect an objective determination of the value of the right being granted. Arbitrators would inevitably use this initial, unobjective license fee as the standard for the next fee—surely an inequitable result given the genesis of the initial fee and the potential future growth of public broadcasting. The public broadcasters were unwilling to accept our proposal that we begin the agreement with an arbitrated fee and then provide for future arbitrations in succeeding terms.

This, indeed, is the present system—the federal court now provides assurance to public broadcasting that it will not be without a license to perfrom our members' works. We refer to the method of licensing and judicial review of reasonableness of license fees set forth in ASCAP's 1950 Amended Consent Judgment. That Judgment provides that any user who requests a license in writing is automatically licensed. It prescribes a mandatory negotiation period. If the parties fail to agree, the user may ask for judicial determination of a reasonable license fee by the United States District Court for the Southern District of New York. This mechanism has functioned efficiently for both ASCAP and users of copyrighted works over the past 25 years.

In sum, the compulsory arbitration demanded by public broadcasting is unnecessary, indeed it is redundant. Were public broadcasting to drop this demand, it is apparent that agreement would be reached which would satisfy all of public broadcasting's real needs.

We have recited this history so that the Committee will know how little remains to be done before final agreement is reached making this amendment wholly academic.

The chief reason given by public broadcasting for seeking this amendment is that the new copyright law would impose new liability on the public broadcasters. We believe this is a misstatement of the present law.

III. Under current law, public broadcasting is liable for copyright infringement without performance and synchronization licenses

A. PUBLIC BROADCASTERS PERFORM "FOR PROFIT" UNDER THE 1909 COPYRIGHT ACT

Contrary to their repeated assertion that public broadcasters do not need performing rights licenses because they do not perform "for profit" under the 1909 Copyright Act, performances broadcast by the public broadcasters are for profit,

Associated Music Publishers, Inc. v. *Debs Memorial Radio Fund, Inc.*, 141 F. 2d 852 (2d Cir. 1944), was an infringement suit by a copyright owner against the

operators of radio station WEVD in New York. The station was operated by a nonprofit corporation for philanthropic and educational purposes. WEVD performed the plaintiff's copyrighted musical composition on one of its "sustaining" programs, on which there was no commercial advertising. (It also broadcast commericially sponsored programs.) The broadcaster claimed it did not infringe the copyright because it did not perform "for profit".

The court held the performance was "for profit", stating:

"The fees for advertising are obtained in order to aid the broadcasting station to pay its expenses and repay the advances to it by the Forward Association. The 'sustaining' programs are similarly broadcast in order to maintain and further build up the listening audience and thus furnish the field from which the paying advertisers may reap a profit. *It can make no difference that the ultimate purposes of the corporate defendant were charitable or educational. Both in the advertising and sustaining programs Debs was engaged in an enterprise which resulted in profit to the advertisers and to an increment to its own treasury* whereby it might repay its indebtedness to Forward Association and avoid an annual deficit . . . . The performance was for profit and the owner had the statutory right to preclude each and all of them [the defendants] from reaping where they had not sown." (at 855, emphasis added.)

As in *Debs*, a sizable portion of public broadcasting revenues are contributed by corporate "underwriters". These "underwriters" advertise their sponsorship of programs broadcast by public broadcasters and receive good will and profit in return. There is no doubt that these "underwriters" are equivalent to sponsors of commercial broadcasters. There has, in fact, been a recent judicial finding to that effect.

In *Rohauer* v. *Killiam Shows, Inc.*, 379 F. Supp. 723 (S.D.N.Y. 1974), a public television station (WNET, New York) was held liable for copyright infringement. It broadcast a film without permission of the owner of the copyright. In discussing the liability of the program's corporate "underwriter", the Bowery Savings Bank, the court said:

"With regard to the liability of the Bowery Savings Bank, I should note at the outset that I attach no weight to its self styled role as an 'underwriter' rather than a 'sponsor' of the televised showings. Programs shown on educational television stations, such as Channel 13, do not have sponsors in the conventional sense; rather, a company which has contributed toward the presentation is usually permitted a brief and rather sedate announcement of its contribution, which usually appears at the end of the program. Here, in addition, the entire 'Silent Years' series was extensively advertised in the press, on public buses, and in other media; all such advertising bore Bowery's name. It is also conceded that Bowery distributed posters bearing its name as well as a still photograph from the motion picture. *Although Bowery was unable to engage in the crasser forms of self promotion to which commercial television has accustomed us, I find that its participation in the financing and promotion of the series qualifies it as a sponsor.*" (at 729–730, emphasis added)

The sedate type of announcement used to credit sponsors of public broadcasting programs is very similiar to the form used in radio's infancy. Typically, an announcement is made at the beginning and end of public television shows, stating "This program is made possible through a grant from the XYZ corporation". Compare this with the only announcements made at the beginning and ending of programs of radio station WOR in 1923: This is Radio Station WOR, a service of L. Bamberger & Co., One of America's Great Stores, Newark, N.J. Those announcements were held to make the station's performances of copyrighted music "for profit". *M. Witmark & Sons* v. *Bamberger & Co.*, 291 F. 776 (D.N.J. 1923). The court said:

"Undoubtedly the proprietors [of Bamberger's] in their individual capacities have done and do many things of a public spirited and charitable nature on account of which they are entitled to the highest commendation. But it does not appear, and the court cannot believe, that these charitable acts are all labeled or stamped, 'L. Bamberger & Co., One of America's Great Stores, Newark, N.J.'" (at 779)

Public broadcasters perform copyrighted works in programs which they use to attract audiences, just as WEVD did in the *Debs* case. They use these audiences to gain financial support, through direct viewer and listener contributions and also through corporate sponsorship of programs. The corporate sponsors in turn derive profit from advertising and good will as in the *Rohauer* case. However viewed, these performances are clearly "for profit".

B. PUBLIC BROADCASTING HAS INFRINGED BOTH PERFORMANCE AND SYNCHRONIZATION RIGHTS BUT COPYRIGHT OWNERS HAVE EXERCISED FORBEARANCE IN THE EXPECTATION THAT AGREEMENT WOULD BE REACHED.

Clearly, the owners of copyrighted musical compositions could have successfully sued the public broadcasters for copyright infringement under the present law. They have not done so for two principal reasons.

First, public broadcasting can be said to have been in its infancy during the 1960's. Initially, public broadcasting stations had to struggle to become established. This paralleled the development of commercial radio, commercial television and each new user industry. Copyright proprietors have felt that infant industries should be encouraged in their development. ASCAP granted free licenses to commercial television networks and stations until 1949.

Second, as has been shown, negotiations between copyright owners and public broadcasting have been carried on almost constantly since the mid-1960's. Throughout that period, we hoped to reach agreement and therefore saw no reason to commence infringement litigation.

Our forbearance is, we think, evidence of our members' good faith and desire to aid public broadcasting. We believe the time has come for public broadcasting, now quite mature, to reciprocate and join all other users of copyrighted works by entering into reasonable license arrangements.

IV. *Public broadcasting has grown and changed significantly in the past decade, and can be expected to continue to grow and to change*

The public broadcasting industry has grown and changed so that a compulsory license is even more inappropriate today than it was when first proposed by public broadcasting in 1967.

A. THE PUBLIC BROADCASTING INDUSTRY NOW COMPETES WITH COMMERCIAL BROADCASTING AS A NATIONAL MEDIUM

In the early 1960's public broadcasting was universally known as "educational broadcasting". It consisted of local stations licensed almost exclusively to educational institutions, state school systems or school boards, whose purposes were correspondingly educational in nature: to expand or enrich the classroom experience.

The catalyst for change from educational to public television was the report of the Carnegie Commission on Educational Television, released in 1967. Its recommendations were central to the Public Broadcasting Act of 1967, which established the Corporation for Public Broadcasting to provide interconnection of the individual stations, develop outlets for national programming, and increase the support given to local stations.

CPB in turn established the Public Broadcasting Service to manage the interconnection service which became operational in late 1970. PBS not only serves as an interconnector of the stations, but also as a central coordinator between the stations and program producers. The radio equivalent of PBS is National Public Radio (NPR) which came into being in early 1971. Unlike PBS, NPR produces some of its own programs as well as coordinating other producers and local stations. See, generally, "The Story of Public Broadcasting", *Broadcasting*, November 8, 1971, pp. 30–36.

The difference between the number of educational broadcasting stations in 1965, and the number of public broadcasting stations in 1975, demonstrates the large and rapid growth of the industry. In 1965 the number of noncommercial educational television stations in operation was 103 and the number of noncommercial radio stations was 259. Today, there are 254 public television stations and 660 public radio stations in operation.

Public broadcasters clearly compete with commercial broadcasters for audience. They compete in other ways too: According to *Broadcasting*, August 19, 1974, "Public television stations in major markets are competing vigorously with commercial facilities to supply production and technical services for fee. Commercial broadcasters who helped furnish equipment and money for early development of educational TV are beginning to think they were had." In producing and duplicating programs for sale to schools and other users, public broadcasters also compete with companies engaged in marketing audiovisual material to the same buyers.

By developing a national interconnection service and a central program clearing house, public broadcasting now competes with commercial broadcasting on a

nationwide basis. Masterpiece Theatre, for example, reaches the same national audience as any commercial network programs.

B. THE PROGRAMMING OF PUBLIC BROADCASTING CONTAINS SUBSTANTIAL ENTERTAINMENT AND CULTURAL MATERIAL THAT COMPETES WITH COMMERCIAL BROADCASTING FOR THE SAME AUDIENCE

In its testimony before this Subcommittee in 1965, and before the Senate in 1967 see, generally, *Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess., ser. 8, pt. 1 (1965)—hereinafter "The 1965 House Hearings" and *Hearings on S. 597 before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967)—hereinafter "The 1967 Senate Hearings"), public broadcasting repeatedly stressed that it was providing an *educational* service to schools and homes by supplying *instructional and educational* programs. The claim that its *educational* programs were much different from the *entertainment and cultural* programs supplied by commercial broadcasters runs throughout the testimony. For example, William G. Harley, President of the National Association of Educational Broadcasting (NAEB), stated (1965 House Hearings, at 484):

"To impose commercial standards and restriction upon copyrighted materials used for *educational* purposes by *educational* stations would severely limit the effect of operation and development of these stations in the service of education." (emphasis in original)

At the same hearings, Eugene N. Aleinikoff, chairman of the Joint National Educational Television—Educational Television Stations Committee on Music and Copyright, stated (at 486–487):

". . . let me make clear exactly what ETV [educational television] stations are and the nature of the educational programing they broadcast. . . . ETV stations broadcast television lessons for the local schools from 9 a.m. to 3 p.m. every day. The late afternoon is usually devoted to teacher-training courses and programs for children. Evening programing is divided between adult education and community topics, supplemented by broader documentary and cultural programs provided by National Educational Television and other regional organizations. Whatever its source, this adult programing is invariably selected to inform and enlighten an interested and engaged audience, rather than merely to entertain or pass the time of a mass audience. Exhibit 'C', which is also attached, is a statement of the average weekly schedule of the ETV station operating at the University of North Carolina. We thought the committee would be interested in seeing a weekly schedule to examine exactly what kinds of programs are broadcast by a university station."

The weekly schedule Mr. Aleinikoff referred to as "Exhibit C" is appended to our statement as Exhibit A.

To paraphrase Mr. Aleinikoff, we think the Subcommittee will be interested in comparing a current weekly schedule of the same station, which is attached as Exhibit B, with the 1965 schedule.

In 1965, during the school day (9 a.m.–3 p.m.), Station WUNC–TV broadcast such programs as "U.S. History: 11th grade level," "Physical Science: 9th grade level," and "World History: 10th grade level." During the week of June 21–27, 1975, the only programs broadcast during the school day were "Sesame Street," "Mr. Rogers" and "The Electric Company." Certainly, these fine programs are aids to education. Our point, however, is that they are *nationally* produced and distributed programs. Public broadcasting can no longer allege any difficulty with copyright clearances and payments for such programs. (Indeed, Children's Television Workshop, producer of "Sesame Street" and "The Electric Company," is ASCAP's neighbor, one floor below us at One Lincoln Plaza.)

A comparison of the late afternoon programming is also revealing. For example, the 1965 Wednesday afternoon schedule included "Methods for Modern Teachers," "Lip Reading" and "College Credit Course: First Year Algebra." In 1975, the 3–6 p.m. time slot continued to be filled by "Sesame Street," "The Electric Company" and "Mr. Rogers."

But most revealing is a comparison of the evening programming, which Mr. Aleinikoff in 1965 described as "adult education and community topics supplemented by broader documentary and cultural programs . . . selected to inform and enlighten, . . . , rather than merely to entertain or pass the time of a mass audience." The weekday evening programs in 1965 included "Public Affairs," "Encounter-discussion program," "The French Chef," "Landscaping Your Home,"

"Science and Engineering Television Journal," "College Credit Course: History" and "Basic Concrete Technology." In 1975, there are still some instructional and public service programs, such as "Folk Guitar," "General Assembly Today," and "Consumer Survival Kit." However, we now also find pure entertainment programs, such as "Monty Python's Flying Circus," "At the Top—Music," "The Way It Was—Sports" and "Hollywood Television Theater." No one can seriously claim these programs are not designed to "entertain . . . a mass audience."

Obviously, public broadcasters seek as sizable an audience as possible. As *Broadcasting* stated in its issue of November 8, 1971: "David Ives, President of WGBH-TV, responded with one word when asked how he would react if that station suddenly found itself ranked second in its market: 'Yippeeee!' "

This drastic change in programming, from purely "educational" shows to "entertainment" and "cultural" shows, applies not only to one station in North Carolina, but to all public broadcasting stations. In 1967, the public broadcasters submitted a number of charts analyzing "ETV broadcasts and programs" to the Senate Subcommittee. Chart 4, printed in the 1967 Senate hearings at 225 and attached to our statement as Exhibit C, shows the general broadcast categories of programs over thirteen public broadcasting stations. The programs (which were counted by number rather than by hours) were divided into three categories: in-school instructional, non-classroom studies, and adult informational and cultural. Entertainment programs were placed in the last category.

We made a similar study of programs over eleven of the same thirteen stations (listings for two stations were unavailable) for weekly periods in January, 1975. The result is attached as Exhibit D. The percentage of non-classroom study programs remained the same, 30%. The percentage of in-school instructional programs declined from 43% in 1967 to 14% in 1975. And 85% of those in-school instructional programs are nationally distributed programs such as "Sesame Street", "The Electric Company" and "Mr. Rogers". The dramatic change is in the adult informational, cultural and entertainment programs—an increase from 27% in 1967 to 57% in 1975.

Public broadcasters are now concerned with "show biz" just as commercial broadcasters are. Certainly one may argue over the relative merits of the entertainment programs broadcast by the two systems—"Masterpiece Theatre" may be more "worthwhile" to some than "All In The Family". But both are broadcast to attract and entertain mass audiences. The argument that public broadcasters should be treated differently from commercial broadcasters, if it ever made sense, makes none when both are competing for the same audience with the same type of programs.

C. THE REVENUES OF PUBLIC BROADCASTING HAVE GROWN SUBSTANTIALLY IN THE LAST DECADE

The total income from all sources to public broadcasting in fiscal 1970 was $103,640,692 (*Broadcasting*, November 8, 1971). According to the 1974 annual report of the Corporation of Public Broadcasting, the industry's income for fiscal 1973 grew to $238,800,000—an increase of 230%.

One large and increasing component of public broadcasting's revenues is contributions by corporations, referred to by public broadcasting as "underwriters" and by the court in the *Rohauer* case as "sponsors". According to CPB's 1974 annual report, grants from business and industry totaled almost $8,000,000 for fiscal 1973.

The increase of contributions by a firm like Mobil Oil reveals the value corporations ascribe to sponsoring public broadcasting programs. In 1971, Mobil gave $490,000 for public television programs (*The Village Voice*, May 12, 1975). By 1975, that sum had grown to $2,000,000 (*New York Times*, May 31, 1975). Mobil pays the commercial networks only twice as much, $4,000,000 per year.

The fact that corporations spend large amounts on public television programs demonstrates the value of the good will and advertising they derive from such sponsorship. That value is also reflected in the amounts of money spent by corporate sponsors on other advertising, designed to connect public broadcasting programs with the sponsoring corporation. In 1971, Mobil allocated $260,000 to such advertising (*The Village Voice*, May 12, 1975). By 1975, that amount had increased to $700,000 (*The New York Sunday News*, February 9, 1975)

Corporate sponsors are quite explicit about the reasons for their sponsorship of public broadcasting programs. Robert Kaufman of Bristol Myers, which provided $850,000 for "The Thin Edge", a series on mental health, explained: "We

think we receive great prestige to be identified (in the public mind) with something like this." (*The Village Voice*, May 12, 1975). Indeed, the commercial advantages of sponsorship of public television programs are so great that a proposal has been made to end the "hypocrisy" of the system and introduce commercials to public television (*The New York Times*, June 15, 1975).

Accordingly, we find that public broadcasting not only rivals commercial broadcasting in structure and competes for the same audience, but it also competes with commercial broadcasting for sponsorship revenues. Indeed, public television is viewed by many as the best institutional advertising medium available. If it sells companies, rather than products, it is no less an advertising medium.

D. THE MATHIAS AMENDMENT DOES NOT TAKE INTO ACCOUNT THE POTENTIAL GROWTH AND CHANGE OF PUBLIC BROADCASTING

When this Committee held hearings in 1965 on the public broadcasting aspects of copyright law revision, its members saw that educational broadcasting was developing in ways that brought it closer to commercial television. In questioning the public broadcasting representatives, Congressman Kastenmeier asked:

"But do you not feel that authors, composers, and publishers are concerned in part that educational broadcasting, especially television broadcasting, has approached commercial broadcasting in program content and in moving for a share of the general audience? Don't you feel this must be a concern of some authors, composers, and publishers?"

Mr. Aleinikoff replied:

"I think there is a great deal of concern about educational television and the kind of programming it is presenting. That is one of the reasons why I was careful to include in the exhibit an example of the kind of broadcast that is being made by ETV stations today.

"It is a difficult problem. Commercial networks broadcast credit courses at six o'clock in the morning. That does not make them educational broadcasters.

"Educational stations broadcast symphony concerts at night, yes; but these are really a minority of the kind of programs they do broadcast. If you will look at any of the ETV schedules you will see that there are mostly credit courses and other material of a direct educational nature. The more general programs that people have talked about here, such as symphonies, are, in the main, national programs produced by National Educational Television or by one of the other large ETV programming organizations where, as far as I know, all of the copyrights are cleared by the producer." (1965 House Hearings at 512–513).

As we have seen, the nature of public broadcasting's programming did change radically. Public broadcasting no longer is concerned exclusively (if it ever really was) with material of a direct educational nature. It is increasingly concerned with entertainment programming. The educational programs are no longer local credit courses—they are now nationally produced and distributed programs. In 1965, the producers, as Mr. Aleinikoff said, were obtaining synchronization licenses. They never obtained performance licenses and stopped seeking synchronization licenses in 1967.

In a similar vein, the following exchange took place between Congressman Poff and Mr. Aleinikoff:

"*Mr. Poff.* Mr. Chairman, I would like to make one further statement rather than propound a question.

"I am sure the witnesses understand that this subcommittee and this Congress are faced with the problem of legislating not alone for the present, but for the unforeseeable future. It is true that ETV is now in its infancy. Its financial resources are limited. The scope of its effort is not as broad as it one day will be.

"We must, I say, look to the future in trying to weigh the equities involved and trying to balance the rights, one against the other, hopefully in the end serving the long-range national interest.

"So, I hope that those on both sides of this issue will appreciate the delicacy, the difficulty which is ours and will help us, and I am sure you want to help, to arrive at an equitable solution.

"*Mr. Aleinikoff.* I think we agree, but I would like to emphasize this one thing if I can. I think that we who are in educational broadcasting feel seriously that we are a part of the educational process.

"One of the things that has affected us in this endeavor has been a kind of singling out of educational television as a different mechanism and quality. We feel we are a part of education.

"*Mr. Poff.* You are indeed a part and you will become an increasingly important part of the whole educational effort. You must also concede, of course, that in some measure even now you are in competition with commercial television stations and it is possible that the future may hold some unknown things in that area.

"This is what I have in mind when I say that we have a difficult chore in balancing all the equities.

"*Mr. Aleinikoff.* I think we would say we are in competition with commercial television only in the same way that an adult extension lecture is in competition with the movies. In other words, we are in competition for viewers' interest, and for people to watch and to learn from our programs. We do not feel that we are in competition on subject matter.

"*Mr. Poff.* You are not competing with them for profit, of course, but you are competing with them for their audience and an audience is a profit to a commercial television station.

"That is what I mean when I say you are competing with them. To whatever extent you reduce their audience aren't you reducing their commercial potential, the potential profit they might be able to make? I am not arguing their case. I am simply stating the facts to illustrate what I mean." (at 515–516).

Mr. Poff was prescient. And Mr. Aleinikoff's statement has lost any accuracy it ever had. Public broadcasting is not in competition with commercial television only in the same way that an adult extension lecture competes with the movies. As Congressman Poff noted, public television does reduce the audience for commercial television.

By reducing the audience for commercial broadcasting, public broadcasting not only reduces the potential revenues of the commercial broadcaster, on which ASCAP's fees are based, but also reduces the commercial potential of the *material* being broadcast—including the copyrighted works contained in the programs. For example, if PBS were to network a series of musical specials on the works of a particular composer, time or type, no commercial network would produce and broadcast a similar series for a long time thereafter. The public television series would "saturate" the market for such specials. Those whose music was used would not only be deprived of deserved income so long as public broadcasting pays nothing, they would also lose the potential market of commercial broadcasting.

In 1965 Congressmen Kastenmeier and Poff foresaw the future. Today, as then, Congress must legislate not alone for the present but for the future too. It must consider the present size, structure and programming of public broadcasting and its potential growth and future. We believe that when these are viewed realistically the only conclusion that can be reached is that public broadcasting needs no special treatment—on the contrary, the interests of creators and the public at large require that licensing arrangements be made with this industry in precisely the same way they are made with all others.

V. None of the justifications offered by public broadcasting for the Mathias amendment are valid

Public broadcasting has offered three justifications for the Mathias Amendment: First, it claims that it has encountered great difficulty in clearing copyrighted musical compositions for broadcast; second, that the costs are prohibitive; and third, that it is somehow "different" from all other users of copyrighted works and therefore requires special treatment.

None of these is valid.

A. THERE IS NO PROBLEM IN CLEARING BROADCAST OF COPYRIGHTED MUSICAL COMPOSITIONS

Public broadcasting argued the "difficult clearance" point by stating: "Under S. 1361 as enacted by the Senate, public broadcasting would be required to clear and negotiate payment for each piece of copyrighted material. The difficulty for public broadcasting in obtaining such licenses expeditiously from copyright proprietors is undeniable." (PBS Comments, p. 6) As far as copyrighted music is concerned, this statement is incorrect and we deny it.

First, performance rights are easily licensed. By entering into a license agreement with each of the three major performing rights organizations, ASCAP, BMI and SESAC, public broadcasting can be assured of performance licenses in virtually all copyrighted musical compositions. Second, copyright proprietors have offered to grant synchronization licenses so that public broadcasting can be assured of such licenses for all its broadcasts. There is simply no clearance burden on public broadcasting whatsoever.

In the mid-1960's, when public broadcasting was still securing individual synchronization licenses, it had no "difficulty" in clearance. This fact is demonstrated by copies of four illustrative letters from NET to one music publisher, Associated Music Publishers, Inc., attached as Exhibit E. These letters contradict PBS' recent assertions on clearance "problems".

For example, in the PBS Comments, especially in the attachment on clearance problems from WNET–TV, public broadcasting claims that it is often impossible to obtain synchronization licenses because of rigid production deadlines. But NET's letter to Associated Music Publishers of March 8, 1965 acknowledges that the publisher has helped in meeting those deadlines: "In conclusion, I would like to thank you very much, on behalf of N.E.T. for your efforts in our behalf in seeing us through clearance of the above in time for our production deadlines."

In addition, the WNET memorandum states (at page 6) "under the present system it is naive to expect that clearance be received prior to transmission." What is not said is the crucial point: it is standard practice in the television industry to clear compositions after production, and even after broadcast. In fact, this was also NET's practice. NET's letter to Associated Music Publishers of August 13, 1965 states:

"We wish to thank you and Associated Music Publishers, Inc., very much for your most helpful cooperation in completing this work and especially for the use of this very fine music. You will note that I have dated these licenses somewhere in the vicinity of the date on which they were recorded."

Standard arrangements can readily be worked out as shown by NET's letters to Associated Music Publishers of January 14 and August 22, 1966. Indeed, by August, 1966, the licensing procedure had become so routine that NET could say "As usual, would you sign a copy of this license and return it to my attention."

Public broadcasting has also claimed that there would be great clearance difficulties because of the many local programs produced by individual stations, especially instructional programs designed for school use. But, as we have seen, virtually all programs broadcast during school hours on public broadcasting stations are national programs, such as "Sesame Street". Indeed, under the copyright owners' present proposal to public broadcasting, synchronization licenses would be granted for both national and local programs.

In sum, the clearance problems are illusory, not real, and provide no justification for a compulsory license.

B. LICENSE FEES OFFERED TO PUBLIC BROADCASTING HAVE ALWAYS BEEN REASONABLE

Chalmers H. Marquis, Executive Director of Educational Television Stations, a division of the National Association of Educational Broadcasters, estimated that the costs of copyright licenses would run at least $12,600 per year for each educational television station (1967 Senate Hearings, at 1008). We have no idea how this figure was arrived at, or how much of this guess relates to music. If we assume half this amount is for music and multiply by the 250 educational television stations broadcasting today, we would arrive at fees of approximately $1,500,000 annually. If *all* of the cost were for music, that figure becomes $3 million.

Mr. Marquis' estimate should be compared with license fees paid by public broadcasters in other countries of the world. Representative figures paid for rights to musical compositions in 1974 are:

Britain: $7,870,272 (3,279,280 pounds).
Netherlands: $2,666,240 (6.4 million guilders).
Italy: $11,301,281 (7,052 million lire).
Austria: $4,176,000 (69,247,584 shilling).
Switzerland: $1,666,190 (6,638,212 Swiss francs).
Canada: $1,500,000 (Canadian dollars).
Sweden: $2,694,585 (10,567,000 kroner).
France: $7,909,379 (32,717,520 French francs).

Of course, the situation in those countries may be different from ours, and neither we nor the public broadcasters have bargained on the basis of a full exploration of the economic facts. America's copyright proprietors have offered public broadcasting experimental licenses at rates far below the levels paid abroad.

C. A COMPULSORY LICENSE CANNOT BE JUSTIFIED BY ANY CLAIMED DIFFERENCES BETWEEN PUBLIC AND COMMERCIAL BROADCASTING

Public broadcasting has continued, in 1975, to try to distinguish its needs from those of commercial broadcasting. It still says (PBS Comments at p. 15):

"The special factors present in public broadcasting indicate generally the critical need for copyright consideration beyond the non-statutory clearance practices previously developed in commercial broadcasting. Suffice it to say in summary that the programmatic aim and content are far different, the extent and volume of copyright clearance far greater, and the financial and administrative resources far smaller. But more than that, it should not be forgotten that the commercial broadcasters, both local stations and national networks, are almost continually in negotiation with the three musical performance rights societies about royalty rates, and that the attendant litigation in court has been voluminous indeed."

This statement is remarkable for being incorrect in each particular. First, public broadcasting's programming now includes entertainment in direct competition with programming of commercial broadcasters. The days of heavily instructional "educational" television are over, and public broadcasting now more closely resembles commercial broadcasting.

Second, even if the allegation that the extent and volume of public broadcasting's copyright clearance is far greater than that of commercial broadcasting is correct, the license agreements offered by the copyright owners satisfy any "problems" with clearance. The licenses, in fact, would not require advance clearance of any nondramatic musical compositions.

Third, public broadcasting's claim that its financial and administrative resources are far smaller than those of commercial broadcasting is dispelled by the significant growth of public broadcasting revenues over the last decade. Further, copyright owners have always recognized and respected public broadcasting's special financial situation, and have offered initial licenses at extremely low fees.

Finally, the claim that there is almost continual negotiation and litigation between commercial broadcasters and the performance rights organizations is not true. If true, it would not affect the public broadcaster because, under the auspices of the Senate Subcommittee, the copyright owners have offered a one-package agreement to public broadcasting as a result of a single negotiation.

The fact is that the performing rights societies and the individual publishers who license synchronization rights have always been willing to enter into license arrangements with public broadcasting which would grant all the rights needed. None of the difficulties envisioned by public broadcasting has ever occurred in any other area of licensing, and there is no reason to think that any of those difficulties would occur in the licensing of public broadcasting. Quite the contrary, the history of licensing of performance and synchronization rights demonstrates that there is no necessity for the Mathias Amendment.

VI. The Mathias Amendment as drafted is ambiguous, impractical, and unworkable.

There are also great technical difficulties with the Mathias Amendment as drafted. Public broadcasting has claimed the Amendment covers only nondramatic uses. It begins "(a) Public broadcast of nondramatic literary and musical works, sound recordings, and pictorial, graphic, and sculptural works shall be subject to compulsory licensing. . . ." It is possible that this language might be read to apply a compulsory license for all "public broadcast" uses. This would include use of a nondramatic work in a dramatic context—a use that has always been licensed by the individual copyright proprietor.

In addition, section (a)(2) of the Amendment states that the "royalty rates may be calculated on a per-use, per-program, pro rated or annual basis as the Copyright Royalty Tribunal finds most appropriate. . . ." Since 1941 ASCAP has offered broadcasters licenses on a blanket or per program basis. Calculation of fees for public broadcasting on some new basis could be perilous for all concerned.

For example, there is no history of per-use licensing of performing rights which might guide the Copyright Royalty Tribunal. Performing rights have uniformly been licensed on a blanket basis, both in this country and abroad. Blanket licensing is recognized as the least costly method of bulk licensing, assuring the widest possible use of copyrighted works at the lowest cost of the user.

The proposed per-use statutory scheme would require public broadcasters to account for all their uses of copyrighted works and to show each type of use. Consider the many different kinds of uses broadcasters may make of copyrighted works—the same songs may be featured as part of a star performer's act, be used as the theme for a program or station, be heard as background throughout the broadcast, be part of a promotional announcement, be instrumental only, or vocal only, etc. What would be the basis for calculating appropriate rates for each different use, or for the same kinds of uses varying only in duration? The recordkeeping burden such licensing would place on public broadcasters would be heavy indeed.

This bookkeeping burden is likely adversely to affect the copyright owners and ultimately, the public. We may be sure that public broadcasters would seek to mitigate the costs of this recordkeeping burden, perhaps by avoiding the use of copyrighted works. If so, copyright owners would suffer direct, economic loss, and the public would be deprived of at least some music it would otherwise hear.

A compulsory per-use licensing scheme is an unknown quantity, introducing costs and concerns where none presently exist. The blanket license which other broadcasters request and which we have offered to public broadcasting ensures that public broadcasters need not be concerned about how much or whose music is being used.

In addition, the Mathias Amendment as drafted could very well allow non-broadcast use of copyrighted works under the compulsory license. Subsection (b) of the Amendment provides:

"For the purposes of this section, 'public broadcast' shall mean production, duplication, interconnection, distribution and transmission of 'educational television or radio programs' by or for 'noncommercial educational broadcast stations' . . . ."

It may well be that the public broadcaster or some other entity distributing a recording of a public broadcast program for non-broadcast purposes, for example to a school, would be entitled to a compulsory license under the Amendment. Public broadcasting has expressed a desire for such "audiovisual" licenses in its negotiations with us and with copyright owners. We have no such rights to license. The copyright owners, who do have the rights, have responded with suggested machinery which meets all of public broadcasting's legitimate needs. Again, this is a use which has, in every case, been licensed solely by the individual copyright proprietor, and for which no compulsory license is necessary or appropriate.

CONCLUSION

The public broadcasting industry has offered no reason it should be treated differently from the rest of the music-performing world. The arguments they have advanced are illusory—no other user of copyrighted music has ever encountered any of the "difficulties" they envision. Quite the contrary, we and other copyright licensors have attempted to cooperate with the public broadcasters and to meet their needs. We remain ready to do so and believe we are very close to a mutually satisfactory agreement on the basis of current discussions, the latest of which was held on July 8, 1975. The Mathias Amendment should be recognized for what it is—an unnecessary and dangerous appendage to the copyright law. It should not be adopted.

EXHIBIT A

WUNC–TV, University of North Carolina, Summary Schedule of a Typical Week

MONDAY MORNING

8:55 Morning news summary: Primarily for school "homerooms" and first hour classes.

9:00 U.S. history: 11th grade level. Five days a week. Basic resource for approximately 10,000 students. Produced under contract with North Carolina Department of Public Instruction.

9:30 Physical science: Ninth grade level. Basic resource for approximately 12,000 students. Produced under contract with the North Carolina Department of Public Instruction.

10:00 World history: 10th grade level. Basic resource for approximately 7,000 students. Produced under contract with the North Carolina Department of Public Instruction.

10:30 Mathematics: Eighth grade level. Basic resource for approximately 9,000 students. Produced under contract with the North Carolina Department of Public Instruction.

11:30 Creative Person (NET).

11:30 Spectrum/Science Reporter (NET).

MONDAY AFTERNOON

12:00 Aspect: In cooperation with the Agricultural Extension Service. Keeps farmers and homemakers abreast of current developments of interest to them.

12:30 Midday news: 15 minutes rounding out the noon "service hour." Source: Associated Press broadcast wire and press releases.

2:15 Geography: Ninth grade level. Basic resource for approximately 5,000 students. Produced under contract with the North Carolina Department of Public Instruction.

6:00 News: A 15-minute summary. (See 12:30.)

6:15 Aspect: A rebroadcast of the 12:00 farm and home program.

6:45 The Friendly Giant (NET): For children, ages 3 through 6. Stories, poems, playlets.

7:00 What's New (NET): For children, ages 7 through 12. Adventure, history, science, etc.

7:30 Public Affairs (NET).

8:30 Encounter: Discussion program, 1 hour. Local and national authorities. Topics such as: "Medicare," "North Carolina Court Reform," "The Law and the Indigent," "The Population Explosion," "Problems of the Aging," "The Status of Women," "Alcoholism," etc.

TUESDAY MORNING

8:55 Morning news summary: Primarily for school "homerooms" and first hour classes.

9:00 U.S. history: 11th grade level. Five days a week. Basic resource for approximately 10,000 students. Produced under contract with North Carolina Department of Public Instruction.

9:30 Physical science; Ninth grade level. Basic resource for approximately 12,000 students. Produced under contract with the North Carolina Department of Public Instruction.

10:00 World history: 10th grade level. Basic resource for approximately 7,000 students. Produced under contract with the North Carolina Department of Public Instruction.

10:30 Mathematics: Eighth grade level. Basic resource for approximately 9,000 students. Produced under contract with the North Carolina Department of Public Instruction.

11:00 Public Affairs (NET).

TUESDAY AFTERNOON

12:00 Aspect: In cooperation with the Agricultural Extension Service. Keeps farmers and homemakers abreast of current developments of interest to them.

12:30 Midday news: 15 minutes rounding out the noon "service hour." Source: Associated Press broadcast wire and press releases.

12:45 Lip reading: For the deaf and friends of the deaf to help develop the skill of lip reading through demonstration and practice.

1:45 Science and nature: A weekly enrichment program for junior and senior high schools. Covers the gamut from spaceships to seashells.

2:15 Geography: Ninth grade level. Basic resource for approximately 5,000 students. Produced under contract with the Department of Public Instruction.

3:30 Parlons Francais teacher's program: An in-service program to prepare classroom teachers for the next day's in-school lesson.

5:30 Young People's Corner: Events, information for the junior high school level.
6:00 News: A 15-minute summary. (See 12:30.)
6:15 Legislative Report: Discussions and interviews with members of the North Carolina State Legislature.
6:45 The Friendly Giant (NET): For children, ages 3 through 6. Stories, poems, playlets.
7:00 What's New (NET): For children, ages 7 through 12. Adventure, history, science, etc.
7:30 The Creative Person (NET).
8:00 The French Chef (NET).
8:30 Landscaping Your Home: Renters and homeowners are helped in solving their landscaping problems.
9:00 Science and Engineering Television Journal (NET).
9:30 College Credit Course: History 599, political and social history of North Carolina to 1835. Carries 2 semester hours of credit.

WEDNESDAY MORNING

8:55 Morning news summary: Primarily for school "homerooms" and first hour classes.
9:00 U.S. history: 11th grade level. Five days a week. Basic resource for approximately 10,000 students. Produced under contract with the North Carolina Department of Public Instruction.
9:30 Physical science: Ninth grade level. Basic resource for approximately 12,000 students. Produced under contract with the Department of Public Instruction.
10:00 World history: 10th grade level. Basic resource for approximately 7,000 students. Produced under contract with the North Carolina Department of Public Instruction.
10:30 Mathematics: Eighth grade level. Basic resource for approximately 9,000 students. Produced under contract with the North Carolina Department of Public Instruction.
11:00 Parlons Francais (NET): Instruction in spoken French for three primary levels.

WEDNESDAY AFTERNOON

12:00 Aspect: In cooperation with the Agricultural Extension Service. Keeps farmers and homemakers abreast of current developments of interest to them.
12:30 Midday news: 15 minutes rounding out the noon "service hour." Source: Associated Press broadcast wire and press releases.
1:30 Music in the Air: A weekly enrichment program for primary grade music classes.
2:15 Geography: Ninth grade level. Basic resource for approximately 5,000 students. Produced under contract with the North Carolina Department of Public Instruction.
2:45 Science and Nature: A weekly enrichment program for junior and senior high school. Covers the gamut from spaceship to seashells.
3:30 Methods for Modern Teachers: An in-service series produced in cooperation with the North Carolina Department of Public Instruction and the School of Education.
4:45 Lip reading: For the deaf and friends of the deaf to help develop the skill of lip reading through demonstration and practice.
5:00 College Credit Course: First year algebra. Carries 3 semester hours credit.
6:00 News: A 15-minute summary. (See 12:30.)
6:15 Aspect: A rebroadcast of the 12:00 farm and home program.
6:45 The Friendly Giant (NET): For children, ages 3 through 6. Stories, poems, playlets.
7:00 What's New (NET): For children, ages 7 through 12. Adventure, history, science, etc.
7:30 Public Affairs (NET).
8:30 Public Affairs (NET).
9:00 Volume One: An anthology—events, information, and discussions of local interest. Topics such as: "Peace Corps," "Songs of the Lads in Gray," "Readings from Modern Drama," and "Songs and Stories of Carolina."

9:30 Basic Concrete Technology: Informal instruction designed as an aid for contractor, builders, and architects.

THURSDAY MORNING

8:55 Morning news summary: Primarily for school "homerooms" and first hour classes.
9:00 United States history: 11th grade level. Five days a week. Basic resource for approximately 10,000 students. Produced under contract with the North Carolina Department of Public Instruction.
9:30 Physical science: Ninth grade level. Basic resource for approximately 12,000 students. Produced under contract with the North Carolina Department of Public Instruction.
10:00 World history: 10th grade level. Basic resource for approximately 7,000 students. Produced under contract with the North Carolina Department of Public Instruction.
10:30 Mathematics: Eighth grade level. Basic resource for approximately 9,000 students. Produced under contract with the North Carolina Department of Public Instruction.
11:00 World of Music (NET).
11:30 Public Affairs (NET).

THURSDAY AFTERNOON

12:00 Aspect: In cooperation with the Agricultural Extension Service. Keeps farmers and homemakers abreast of current developments of interest to them.
12:30 Midday news: 15 minutes rounding out the noon "service hour." Source: Associated Press broadcast wire and press releases.
2:15 Geography: Ninth grade level. Basic resource for approximately 5,000 students. Produced under contract with the North Carolina Department of Public Instruction.
6:00 News: A 15-minute summary. (See 12:30.)
6:15 Aspect: A rebroadcast of the 12:00 farm and home program.
6:45 The Friendly Giant (NET): For children, ages 3 through 6. Stories, poems, playlets.
7:00 What's New (NET): For children, ages 7 through 12. Adventure, history, science, etc.
7:30 You the Deaf: Sign language, lip reading, visuals are used to communicate topics of interest to the deaf.
8:00 World of Music (NET).
8:30 Japanese Brush Painting (NET).
9:00 Performance: Series of concerts with faculty members and students from area colleges and universities.
9:30 College Credit Course: History 599, political and social history of North Carolina to 1835. Carries 2 semester hours credit.
10:15 Lip reading: For the deaf and friends of the deaf to help develop the skill of lip reading through demonstration and practice.

FRIDAY MORNING

8:55 Morning news summary: Primarily for school "homerooms" and first hour classes.
9:00 United States history: 11th grade level. Five days a week. Basic resource for approximately 10,000 students. Produced under contract with the North Carolina Department of Public Instruction.
9:30 Physical science: Ninth grade level. Basic resource for approximately 12,000 students. Produced under contract with the North Carolina Department of Public Instruction.
10:00 World history: 10th grade level. Basic resource for approximately 7,000 students. Produced under contract with the North Carolina Department of Public Instruction.
10:30 Mathematics: Eighth grade level. Basic resource for approximately 9,000 students. Produced under contract with the North Carolina Department of Public Instruction.
11:00 Parlons Francais (NET): Instruction in spoken French for three primary levels.

FRIDAY AFTERNOON

12:00 Aspect: In cooperation with the Agricultural Extension Service. Keeps farmers and homemakers abreast of current developments of interest to them.
12:30 Midday news: 15 minutes rounding out the noon "service hour." Source: Associated Press broadcast wire and press releases.
2:00 Una Aventura Español: Instruction in spoken Spanish for the elementary level.
5:00 College credit course: First year algebra. Carries 3 semester hours credit.
6:00 News: A 15-minute summary. (See 12:30.)
6:15 Aspect: A rebroadcast of the 12:00 farm and home program.
6:45 The Friendly Giant (NET): For children, ages 5 through 6. Stories, poems, playlets.
7:00 What's New (NET): For children, ages 7 through 12. Adventure, history, science, etc.
7:30 Spectrum/Science Reporter (NET).
8:00 Festival of the Arts (NET).
9:00 Local "special" programs: One-time-only programs such as "North Carolina Symphony," highlights from the "Fine Arts Festival," and addresses by campus visitors of note.

SUNDAY

2:00 Basic Concrete Technology: Informal instruction designed as an aid for contractors, builders, and architects.
2:30 Landscaping Your Home: Renters and homeowners are helped in solving their landscaping problems.
3:00 The French Chef (NET).
3:30 Public Affairs (NET).
4:00 Spectrum/Science Reporter (NET).
4:30 The Creative Person (NET).
5:00 Performance: Series of concerts with faculty members and students from area colleges and universities.
5:30 Public Affairs (NET).
6:30 The World of Music (NET).
7:00 Public Affairs (NET).
8:00 Festival of the Arts (NET).

EXHIBIT B

SUMMARY SCHEDULE OF A TYPICAL WEEK WUNC–TV, CH. 4, CHAPEL HILL, NORTH CAROLINA, WEEK OF JUNE 21–JUNE 27, 1975

SATURDAY, JUNE 21

8:30 a.m. Mister Rogers
9:00 a.m. Sesame Street
10:00 a.m. Electric Company
10:30 a.m. Zee Cooking School (Children)
11:00 a.m. Carrascolendas (Children)
11:30 a.m. Zoom
12:00 p.m. Mister Rogers
12:30 p.m. Folk Guitar Laura Weber
No further listings

SUNDAY, JUNE 22

2:30 p.m. Guide for Living Religion
3.00 p.m. World Press
4:00 p.m. Book Beat
4:30 p.m. Romagnoli's Table—Cooking
5:00 p.m. Now: Carolina Activities
5:30 p.m. Wall Street Week
6:00 p.m. North Carolina People
6:30 p.m. Zoom
7:00 p.m. Vision On
7:30 p.m. Nova-Science
8:30 p.m. Masterpiece Theater—Upstairs Downstairs
9:30 p.m. Firing Line
10:30 p.m. Woman—Discussion

MONDAY, JUNE 23

10:00 a.m.	Sesame Street
11:00 a.m.	Mister Rogers
11:30 a.m.	Electric Company
4:00 p.m.	Mister Rogers
4:30 p.m.	Sesame Street
5:30 p.m.	Electric Company
6:00 p.m.	Your Future Is Now
6:30 p.m.	Zoom
7:00 p.m.	Antiques
7:30 p.m.	Book Beat
8:00 p.m.	At The Top—Music, Maynard Ferguson "GOT THE SPIRIT", "I CAN'T GET STARTED WITH YOU", "MACARTHUR PARK"
9:00 p.m.	Conversion With Myself—Alan Watts "WAY OF ZEN"
9:30 p.m.	One of A Kind—Music Sonny Terri and Brownie McGhee, "WALKIN' MY BLUES AWAY"
10:00 p.m.	Camera South

TUESDAY, JUNE 24

9:30 a.m.	AG Briefing
10:00 a.m.	Sesame Street
11:00 a.m.	Mister Rogers
11:30 a.m.	Electric Company
4:00 p.m.	Mister Rogers
4:30 p.m.	Sesame Street
5:30 p.m.	Electric Company
6:00 p.m.	Your Future Is Snow
6:30 p.m.	Micro Processors
7:00 p.m.	Folk Guitar, Laura Weber
7:30 p.m.	General Assembly Today
8:00 p.m.	Heritage Of Hope
8:30 p.m.	Nova
9:30 p.m.	Monty Python's Flying Circus
10:30 p.m.	The Way It Was—Sports

WEDNESDAY, JUNE 25

10:00 a.m.	Sesame Street
11:00 a.m.	Mister Rogers
11:30 a.m.	Electric Company
4:00 p.m.	Mister Rogers
4:30 p.m.	Sesame Street
5:30 p.m.	Electric Company
6:00 p.m.	Your Future Is Now
6:30 p.m.	Micro Processors
7:00 p.m.	Summer Sounds
7:30 p.m.	General Assembly Today
8:00 p.m.	Feeling Good—music and sketches on obesity
8:30 p.m.	They Don't Laugh At Hoboken Anymore—Report
9:00 p.m.	The Good Times Are Killing Me—Documentary
10:00 p.m.	The Thin Edge—Aggression

THURSDAY, JUNE 26

10:00 a.m.	Sesame Street
11:00 a.m.	Mister Rogers
11:30 a.m.	Electric Company
4:00 p.m.	Mister Rogers
4:30 p.m.	Sesame Street
5:30 p.m.	Electric Company
6:00 p.m.	Antiques
6:30 p.m.	Micro Processors
7:00 p.m.	Consumer Survival Kit
7:30 p.m.	General Assembly Today
8:00 p.m.	In Search of A Maestro—Documentary on aspiring conductors—serious music performed

9:00 p.m. Hollywood Television Theater—Shaw's "The Man of Destiny"
10:00 p.m. Male Menopause—Sketches and Songs

FRIDAY, JUNE 27

10:00 a.m. Sesame Street
11:00 a.m. Mister Rogers
11:30 a.m. Electric Company
4:00 p.m. Mister Rogers
4:30 p.m. Sesame Street
5:30 p.m. Electric Company
6:00 p.m. Carrascolendas (Children)
6:30 p.m. Micro processors
7:00 p.m. N.C. News Conference
8:00 p.m. Washington Week In Review
8:30 p.m. Black Perspective on the News
9:00 p.m. Consumers Survival Kit
9:30 p.m. Play of the Month—"CIDER WITH ROSIE"

EXHIBIT C

CHART 4.—GENERAL BROADCAST CATEGORIES

Station	Inschool instructional	Nonclassroom studies	Adult informational and cultural
WNDT	16	10	7
WMHT	19	7	7
WNED	10	10	2
WNYC	0	5	14
WHYY	12	15	11
WGBH	10	9	11
WEDH	7	8	5
KNZ	6	0	0
WPSX	12	10	4
WETA	14	5	10
WHRO	16	2	3
WQED	13	12	8
WUNC	7	7	7
Total	142	100	89

EXHIBIT D

PUBLIC BROADCASTING PROGRAMS, GENERAL BROADCAST CATEGORIES

Date: Station [1]	Inschool instructional	Nonclassroom studies	Adult informational and Cultural
Jan. 13, 1975:			
WNET—New York, N.Y	[2] 2 (2)	6	13
WMHT—Schenectady, N.Y	2 (1)	6	10
WNED—Buffalo, N.Y	2 (1)	7	12
WNYC—New York, N.Y	5 (5)	2	11
WHYY—Wilmington, Del	2 (2)	3	10
Jan. 6, 1975: WGBH—Boston, Mass	2 (2)	5	8
Jan. 13, 1975: WEDH—Hartford, Conn	2 (2)	5	7
Jan. 20, 1975:			
WPSV—Clearfield, Pa	0 (0)	5	14
WETA—Washington, D.C	6 (4)	4	13
WHRD—Hampton Roads, Va	1 (1)	6	5
WQED—Pittsburgh, Pa	2 (2)	8	6
Total	26 (22)	57	109

[1] Listings for stations KNZ, Mineola, Long Island, N.Y., and WUNC, Chapel Hill, N.C., were unavailable for January, 1975.
[2] Figures in parentheses () are national programs such as "Sesame Street", "The Electric Company", and "Mister Rogers", broadcast during school hours.

EXHIBIT E

LETTERS ATTACHED DATED MARCH 8, 1965, AUGUST 13, 1965, JANUARY 14, 1966, AND AUGUST 22, 1966

NATIONAL EDUCATIONAL TELEVISION,
New York, N.Y. March 8, 1965.

Mr. BENJAMIN GRASSO,
Associated Music Publishers, Inc.,
New York, N.Y.

DEAR MR. GRASSO: This is to request final licensing for the AMP composition to be included in various N.E.T. programs, the terms and conditions for which were agreed upon during our meeting at your office last week. The complete information is as follows:

PROGRAM AND TITLE

SERIES

Music in the 20's.

Program No. 3: "Jazz and Jazz Influence."
 Composition: LA CREATION DU MONDE, by Darius Milhaud.
 Length: 15 minutes, 30 seconds.
 Use: Visual-Instrumental by Ensemble conducted by Aaron Copland.
 Territory: The World, exclusive of Europe and the so-called "Iron Curtain" countries.
 Term: Until December 31, 1970.
 Fee: $480.00.

Program No. 4: "Neo Classicism and Stravinsky".
 Composition: CONCERTO FOR HARPSICHORD, by Manuel De Falla.
 Length: 15 minutes.
 Use: Visual Instrumental by soloist with Ensemble conducted by Aaron Copland.
 Territory: The World, exclusive of Europe and the so-called "Iron Curtain" countries.
 Term: Until December 31, 1970.
 Fee: $562.50.

Program No. 6: "New Movement in Opera".
 Composition: HIN UND ZURUCK, by Paul Hindemith.
 Length: Approximately 12 minutes by soloist with Ensemble conducted by Aaron Copland.
 Use: *Dramatic* Visual-Vocal.
 Territory: The World, exclusive of Europe and the so-called "Iron Curtain" countries.
 Term: Until December 31, 1970.
 Fee: $500.00.

Program No. 8: "Nationalism (New World Style)".
 Composition: Suite for Voice and Violin, by Heitor Villa-Lobos.
 Length: 5 minutes, 45 seconds.
 Use: Visual-Vocal by vocalist and solo violinist.
 Territory: The World, exclusive of Europe and the so-called "Iron Curtain" countries.
 Term: Until December 31, 1970.
 Fee: $225.00.

Program No. 9: "New Faces".
 Composition: String Quartet No. 3, Op 22 (4th and 5th movements), by Paul Hindemith.
 Length: 10 minutes, 30 seconds.
 Use: Visual-Instrumental by String Quartet.
 Territory: The World, exclusive of Europe and the so-called "Iron Curtain" countries.
 Term: Until December 31, 1970.
 Fee: $525.00.

Program No. 10: "American Music In the 20's."
 Composition: Concerto for Piano, Clarinet and String Quartet, Opus 2 (excerpts from the 1st and 2nd movements), by Roy Harris.
 Length: 10 minutes.
 Use: Visual-Instrumental by soloist and Ensemble conducted by Aaron Copland.

Territory: The World, exclusive of Europe and the so-called Iron Curtain countries.
Term: Until December 31, 1970.
Fee: $450.00.

Program No. 11: "Experimental Attitudes I".
Compositions: Charles Rutlage and Serenety, by Charles Ives.
Length: 2 minutes for the former and 1 minute for the latter.
Use: Visual-Vocal by vocalist with piano.
Territory: The World, exclusive of Europe and the so-called Iron Curtain countries.
Term: Until December 31, 1970.
Fee: $150.00.

Program No. 12: "Experimental Attitudes II".
Composition: Piano Pieces: (1) Advertisements, (2), (3), by Henry Cowell.
Length: 8 minutes.
Use: Visual-Instrumental performed by the composer.
Territory: The World, exclusive of Europe and the so-called Iron Curtain countries.
Term: Until December 3, 1970.
Fee: $150.00.

NOTE.—Selections 2 and 3 above are as yet unnamed—Mr. Cowell will select them at time of performance—we will let you know at that time and the titles may then be inserted into license. However, the overall duration will remain 8 minutes.

Series title	*Program title*
THE WORLD OF MUSIC: "Charles Ives—American Phenomenon"	Compositions: Halloween and the Pond, by Charles Ives. Length: Approximately 2 minutes each. Use: Visual-Vocal sung by Corinne Curry with Chamber Group conducted by Harold Farberman. Territory: The World, exclusive of Europe and the so-called Iron Curtain countries. Term: Until December 31, 1970. Fee: $150.00.
THE CREATIVE PERSON: "Marni Nixon"	Composition: Bachianas Brasilieras No. 5: Aria, by Heitor Villa Lobos. Length: 3 minutes, 40 seconds. Use: Visual-Vocal performed by Marni Nixon, with piano. Territory: The World, exclusive of Europe and the so-called Iron Curtain countries. Term: Until December 31, 1970. Fee: $300.00.
N.E.T. SYMPHONY SERIES—1965: "Minneapolis Symphony Orchestra.	Composition: Violin Concerto No. 2 for Violin and Orchestra, Opus 61 by Karol Szymanowski. Length: Approximately 20 minutes. Use: Visual-Instrumental by Henryk Szerying, violin, with the Minneapolis Symphony Orchestra conducted by Stanislav Skrowaczewski. Territory: United States, its territories and possessions. Term: Until December 31, 1970. Fee: $350.00.

NOTE.—With respect to this license, as per our telephone conversation, we would like to have an option which would permit N.E.T. to distribute this program throughout the additional territory of the World, exclusive of Europe and the so-called Iron Countries at any time during the above specified term upon payment of another $200.

Program title: "STRAVINSKY".
Composition: DER BURGER ALS EDELMANN SUITE Op. 60 ("Le Bourgeois Gentilhomme"), by Richard Strauss.

Length: 26 minutes, 30 seconds.
Use: Visual-Instrumental by Orchestra conducted by Robert Craft.
Territory: United States, its territories and possessions.
Term: Until December 31, 1970.
Fee: $550.00.

If you need additional information with respect to any of the above, please call me at once.

As we discussed by telephone, license will not be requested for the composition, PASTORALE, by Stravinsky, as this music was not included in the concert in Boston that is being released as the N.E.T. program entitled Stravinsky.

With reference to the MUSIC IN THE 20's lecture series, please cancel further search for Le Chat from Le Bestiare by Poulenc.

It is understood that all licenses for the compositions listed above will be executed in a similar manner as in previous licensing arrangements with AMP, and will include unlimited educational and non-profit (non-commercial, non-sponsored broadcast as well as non-theatrical instructional audiovisual use (including non-commercial closed circuit exhibition) in the territories and during the term specified in each instance.

With respect to the opera, Intolleranza, by Luigi Nono, Mr. Aleinikoff has asked me to request that a license be drawn up by AMP as per his letter of February 17, 1965, and concurred to by you shortly thereafter. Thank you very much.

In conclusion, I would like to thank you very much, on behalf of N.E.T. for your efforts in our behalf in seeing us through clearance of the above in time for our production deadlines.

Sincerely,

John Q. Adams, Jr.,
Music Clearance.

National Educational Television,
New York, N.Y., August 13, 1965.

Mr. Benjamin V. Grasso,
General Manager, Associated Music Publishers, Inc.,
New York, N.Y.

Dear Mr. Grasso: By messenger, enclosed herein are six (6) checks totaling $6,742.52 together with licenses for music in the N.E.T. "Music in the 20's" and "World of Music" series, as well as for the opera INTOLLERANZA; SYMPHONY #4, by Ives; LE BOURGEOIS GENTILHOMME, by Stravinsky and VIOLIN CONCERTO #2 by Szymanowski. Would you please countersign and return the original of each license to my attention as soon as possible.

We wish to thank you and Associated Music Publishers, Inc., very much for your most helpful cooperation in completing this work, and especially for the use of this very fine music. You will note that I have dated these licenses somewhere in the vicinity of the date on which they were recorded.

Incidentally, I passed on your information about the Hindemith program, and I believe that Mr. Basil Thornton who is head of the N.E.T. International Division has already contacted you. I also spoke to Mr. Curtis Davis who is head of our Cultural Affairs department and all parties seem to be quite interested in this project.

Sincerely,

John Q. Adams, Jr.,
Chief, Music Clearance.

National Educational Television,
New York, N.Y., January 14, 1966.

Benjamin V. Grasso,
General Manager, Associated Music Publishers, Inc.,
New York, N.Y.

Dear Ben: Enclosed herewith are two checks, $250.00 payable to Associated Music Publishers, Inc. and $390.00 payable to G. Schirmer, Inc., for the music included in the SIBELIUS, A SYMPHONY FOR FINLAND program. Also enclosed are the respective licenses. Would you please have the originals countersigned and return to my attention. The carbon copies are for your files.

I will send you a Cue sheet on this program as soon as same is completed. We wish to thank both Associated Music Publishers, Inc. and G. Schirmer, Inc. for

their wonderful cooperation in seeing us through this educational television documentary project. If you, or anyone at G. Schirmer, Inc. has not seen this program (this goes for the Ives show as well) I will be most happy to arrange a screening here at N.E.T. at your convenience.

Once again, thank you very much.

Sincerely,

JOHN Q. ADAMS, Jr.,
Chief, Music Clearance.

NATIONAL EDUCATIONAL TELEVISION,
New York, N.Y., August 22, 1966.

Mr. BENJAMIN V. GRASSO,
General Manager, Associated Music Publishers, Inc.,
New York, N.Y.

DEAR BEN: Enclosed herewith are your usual synchronization license forms covering musical compositions included in N.E.T. programs in our "U.S.A.: Music and Poetry" series. Also enclosed are checks in the amount of $210 in payment for each of these licenses.

As usual, would you sign a copy of each license and return it to my attention. Thank you very much for your cooperation.

Very truly yours,

JOHN Q. ADAMS, Jr.,
Chief, Music Clearance.

STATEMENT OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS

ASCAP opposes the amendment proposed by Senator Birch Bayh to the general copyright revision bill in the 93d Congress (Amendment No. 1831 to S. 1361) which would permit unlimited recordings of instructional programs which make uncompensated use of copyrighted works.

Senator Bayh's amendment would alter Section 112 of the copyright revision bill, entitled "Limitation on exclusive rights: Ephemeral recordings" so that recordings could be made which would be anything but ephemeral—they would be unlimited in number and permanent in duration.

ASCAP licenses only the non-dramatic public performance of our members copyrighted musical compositions. Section 110(2) of the revision bill would permit uncompensated performances of copyrighted works by broadcasts made for reception in classrooms, by disabled persons, or by government employees. We have not objected to this provision in the general public interest and in order to speed enactment of copyright revision.

Section 112(b) of the copyright revision bill, however, especially in the form proposed by Senator Bayh's amendment, would give this exemption vastly extended impact by allowing unlimited free recording of such broadcasts by governmental bodies or other nonprofit organizations which qualify under Section 110(2). The amendment might be read to allow distribution of such recordings by or through governmental bodies or nonprofit organizations which do *not* qualify under Section 110(2), presumably including public broadcasters.

The history of this section reveals a constant and shocking erosion of author's rights. After years of hearings and discussion, the 1967 revision bill drawn by the House Judiciary Committee (H.R. 2512, 90th Cong., 1st Sess., 1967) permitted *one* recording of such a program, for transmission purposes, to be kept for *one* year, with another copy to be kept for archival purposes only. It was then the view that instructional broadcasters who wish to reach wider audiences should make some arrangement with the copyright owners. However, these limitations were removed by a floor amendment adopted without debate.

As originally drafted, the Senate bill (S. 1361, 93d Cong., 1st Sess., 1973) allowed *twelve* recordings for use over a *five-year* period. While this was a significant extension of the original provision drawn by the House, the copyright proprietors did not object, feeling that an objection would unduly delay the passage of revision legislation.

Then the Senate committee expanded this recording privilege in its markup of the bill to *thirty* copies for use over a *seven-year* period, an extension which we felt was unwarranted. Now, Senator Bayh's amendment would remove all limitations, unfairly depriving the copyright proprietor of any compensation for his work.

The instructional broadcaster pays those he employs in the production of his programs—why should he not pay the copyright proprietor? Schools have always bought and paid for textbooks—why should they not pay for copyrighted materials in other forms? Previous bills gave the instructional broadcaster a significant privilege of free recording. Surely, if the instructional broadcaster wishes to make even greater use of copyrighted works, the producer of the program should pay the copyright proprietor a fair fee for his greater use.

It was the intent of Section 112(b) that the use of recordings be limited to those circumstances which permitted free broadcasts under Section 110(2)—broadcasts of instructional programs for reception in classrooms, by disabled persons, or by government employees. As reported out of the Senate committee, Section 112(b) made this clear, by allowing such recordings to be made by "a governmental body or other nonprofit organization *entitled to transmit a performance or display of a work, under Section 110(2)*" (emphasis added).

Senator Bayh's amendment might even remove this important restriction and so allow distribution of such recordings to any other governmental bodies or nonprofit organizations, whether they qualify under Section 110(2) or not. The amendment thus might allow far greater free use of copyrighted works than the draftsmen of copyright revision legislation intended.

We did not object to a limited exemption, as set forth in the original draft of S. 1361, in the hope that this would speed general revision and thus be in the interest of all concerned. But when ephemeral comes to mean permanent and, as a practical matter, uncontrolled, we must object and register our opposition.

[Subsequent to the hearing the following letters were received for the record:]

American Society of Composers, Authors and Publishers,
New York, N.Y., September 29, 1975.

Hon. Robert W. Kastenmeier,
House of Representatives,
Washington, D.C.

Dear Congressman Kastenmeier: Last spring, your Subcommittee held hearings on an amendment to the Copyright Revision Bill proposed by Senator Mathias, which would grant a compulsory license to public broadcasters. In June of this year the Senate Subcommittee rejected the proposed amendment. At the hearings before your Subcommittee, representative of public broadcasting tried to support the Mathias Amendment by claiming that they had met difficulty in the past obtaining synchronization licenses from music publishers, and that the compulsory license was necessary to resolve this "burdensome clearance problem."

In their testimony and statements, representatives of copyright proprietors demonstrated that public broadcasting's claims were unfounded—that, in fact, until public broadcasting stopped *asking* for the necessary synchronization licenses, they had no difficulty at all in obtaining them. Copies of typical letters from a public broadcaster to a copyright proprietor showing how routinely these licenses were requested and granted are in the record as part of ASCAP's statement.

On September 22, 1975, Judge Morris E. Lasker of the United States District Court for the Southern District of New York decided *Columbia Broadcasting System, Inc.* v. *ASCAP, et al.* (No. 69 Civ. 5740, Sept. 22, 1975), an antitrust case involving the licensing of music to CBS for its television network. A copy of the Opinion and Order is attached. CBS claimed that it could not deal directly with ASCAP's members because among other reasons, it would have great trouble locating them. We replied that CBS had no trouble at all finding members for "synch" licensing, and we saw no reason the trouble would be greater if CBS wanted to discuss performances licensing. We now have a judicial finding as to how routinely "synch" licenses are issued, once publishers know they are wanted. The process takes "two to three days at most." The Court said:

"The television synchronization right is the right to record copyrighted music on the soundtrack of a filmed or taped program. Such rights are required for programs which are to be rerun, as distinguished from those (such as sports events or certain "one-run" taped programs) which are regarded as "live" performances. The grant of TV "synch" rights is almost exclusively brokered through the facilities of the Harry Fox Agency, Inc., which represents virtually every major publisher, about 3,500 in all. As outlined by Fox's Managing Director, Albert Berman, and by Robert Wright and Edward Vincent, who are members of producers' staffs, the typical "synch" rights transaction starts with a telephone call to Fox from the producer or from Bernard Brody or Mary Williams, synch rights agents located in Los Angeles who represent producers in their dealings with Fox. Because Fox has instructions regarding each publisher's fee structure, (or, more often, is familiar with it on the basis of past experience) it is usually able to quote prices over the telephone for the compositions which interest the producer. The entire transaction, including actual issuance of the license, is completed within two to three days at most. Fox issues several thousand licenses annually, using a basic staff of only two employees." (Slip Opinion at 46–47).

Here, then, is support on a full trial record for the copyright proprietors' statements that there is existing machinery for granting synchronization licenses which works quickly and efficiently.

Public broadcasting also claimed that alleged difficulties in clearing synchronization rights, including locating the copyright proprietors, resulted in serious production delays. This is contradicted by the Court's statement that the entire transaction, including the issuance of the license, is completed within two to three days at most. It is also contradicted by the Court's discussion concerning the location of copyright proprietors:

". . . Wright, who is on the staff of The Carol Burnett Show, testified that problems in clearing synch rights are "rare". Edward Vincent, a former staff member of the Jim Nabors Variety Hour, testified that the Bernard Brody Agency would have no difficulty in giving him the name and address of any copyright owner.

Even if lines of communication to obtain synch rights were not already established, there are several other ways in which a producer could identify the publisher of music he plans to use. Emil Poklitar, who works in CBS' music clearance department stated that CBS maintains a file containing the relevant information on over 100,000 compositions. Indeed, as Wright testified, publishers regularly barrage television producers with catalogs and brochures to promote the use of their music. Where they have not done so, there appears to be no reason why CBS could not simply request the catalogs of the major publishers. Finally, it should be stressed that in the vast majority of cases, the copyright owner listed on the sheet music or phonograph record is still the owner of the composition in question." (Slip Opinion at 49–50).

In sum, then, the decision of the Court confirms the statements of the copyright proprietors that there are no problems in obtaining synchronization licenses. If public broadcasting's support for a compulsory license arises from concern over "burdensome clearance requirements," that concern is unfounded. The machinery has been there all along—the public broadcasters have chosen, over the past ten years, to ignore it.

We again urge the Subcommittee to reject the Mathias Amendment, and respectfully request that this letter (without the lengthy attachment which would unduly burden the record) be made part of the record.

Finally, on behalf of the members of ASCAP, I again thank you for the opportunity to appear and to testify and for the courtesy extended to me by you and the other members of the Subcommittee.

Sincerely,

BERNARD KORMAN,
General Counsel.

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER,
Washington, D.C., June 5, 1975.

Hon. HERBERT FUCHS,
Counsel, House Subcommittee on Courts, Civil Liberties, and Administration of Justice, Washington, D.C.

DEAR HERBERT: Pursuant to our telephone conversation today, I am enclosing copies of the Mathias and Bayh amendments and a letter, dated November 27, 1974, from Senator McClellan requesting comment on the two amendments.

I also enclose copies of the responses filed with the Senate Copyright Subcommittee by ASCAP, the Authors League of America and the National Music Publishers Association.

Sincerely,

BENJAMIN L. ZELENKO.

Enclosure.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., November 27, 1974.

Mr. STANLEY ADAMS,
President, American Society of Composers, Authors, and Publishers, New York, N.Y.

DEAR MR. ADAMS: During the consideration this year in the United States Senate of S. 1361, legislation for the general revision of the copyright law, Senator Charles McC. Mathias, Jr. introduced Senate Amendment No. 1815 relating to the public broadcast of certain copyrighted works, and Senator Birch Bayh introduced Senate Amendment No. 1831 relating to the making of copies of certain transmission programs. Copies of these Amendments are enclosed.

Neither amendment was called up by its sponsor during the Floor consideration of S. 1361, however, it is anticipated that the issues presented by these amendments will be considered during the further processing of copyright legislation in the Senate early in 1975.

It would assist the Senate in the consideration of these amendments to receive written statements on behalf of interested parties. In order to be of assistance to the Subcommittee on Patents, Trademarks and Copyrights, such statements should be submitted not later than January 15, 1975. It is requested that the Subcommittee be supplied with 20 copies of any submission, to be mailed to the Subcommittee, Room 349-A Russell Senate Office Building, Washington, D.C. 20510.

With kind regards, I am.

Sincerely,

JOHN L. MCCLELLAN.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
New York, N.Y., February 3, 1975.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trade-Marks, and Copyrights, Committee on the Judiciary, Washington, D.C.

DEAR MR. CHAIRMAN: The American Society of Composers, Authors and Publishers (ASCAP) submits this statement in accordance with your letter of November 27, 1974, inviting comments on the proposed amendments introduced by Senator Mathias (Senate Amendment No. 1815) and Senator Bayh (Senate Amendment No. 1831) to S. 1361 for the general revision of the copyright law.

We believe neither amendment is in the interest of the American public or the creators of American music, and so oppose both of them.

Senator Mathias' amendment would deny to authors the right to negotiate with public broadcasters for reasonable terms on which their nondramatic literary and musical works, as well as pictorial, graphic, and sculptural works, would be made available for performance or display over public television and radio stations upon payment of a compulsory license fee to be set by a Copyright Royalty Tribunal. While we are pleased that Senator Mathias agrees with the draftsmen of the general revision legislation that broadcasters should not receive an unjustified "free ride" at the expense of American creators, we do not believe there is any justification for making public broadcasting subject to compulsory licensing.

Public broadcasters pay for the staffs they employ, the talent they hire, and

the services and property they use, in amounts fixed in the open market place. The wages they pay their employees are not fixed by Congress, but rather are negotiated with the employees or their representatives. If they wish to use the property of copyright owners, the fees for those uses should similarly be negotiated. It has always been the American tradition to allow parties interested in the use of a product or service to bargain freely for such use, and that should be the case here.

The special status of public broadcasters in the context of American radio and television has always been recognized by copyright owners. There is no doubt that, in context of free negotiations between the copyright proprietors on one hand and the public broadcasters on the other, reasonable license fees for the use of copyrighted works could be arrived at. Such reasonable fees have been negotiated with commercial broadcasters for over 30 years. There is therefore no reason or necessity for the requirement of a statutory compulsory license fee. We urge the Committee to pass the revision bill in its original form, without Senator Mathias' amendment.

Senator Bayh's amendment would permit unlimited recordings of instructional programs which make uncompensated use of copyrighted works. We also oppose this amendment.

Section 110(2) of the revision bill would permit uncompensated performances of copyrighted works by broadcast where such broadcasts are made for reception in classrooms, by disabled persons, or by government employees. We have not objected to this provision. Section 112(b) of the copyright revision bill, however, especially in the form proposed by Senator Bayh's amendment, would give this exemption vastly extended impact by allowing unlimited free recording of such broadcasts and distribution of copies to other broadcasters.

After years of hearings and discussions concerning copyright revision, the revision bill as drawn by the House Judiciary Committee permitted one recording of such a program, for transmission purposes, to be kept for one year, with another copy to be kept for archival purposes only. It was felt, quite reasonably, that instructional broadcasters who wish to reach wider audiences should make some arrangement with the copyright proprietors. However, these limitations were removed by a floor amendment adopted without debate.

As originally drafted, your committee's bill allowed twelve recordings for use over a five-year period. While this was a significant extension of the original provision drawn by the House, the copyright proprietors did not object, feeling that an objection would unduly delay the passage of revision legislation.

Your committee expanded this recording privilege in its markup of the bill to thirty copies over a seven-year period of use, an extension which we felt was not required. But Senator Bayh's amendment would remove any limitation entirely, unfairly depriving the copyright proprietor of any compensation for his work.

The instructional broadcasters pays those whom he employs in the production of his programs—why should he not pay the copyright proprietor? Your committee's draft bill has already given the instructional broadcaster a significant privilege of free recording. Surely, if the instructional program wishes to make even greater use of copyrighted works, the producer or broadcaster of such program should pay the copyright proprietor of that use.

Further, it was the intent of Section 112(b) that the use of such recordings be limited to those circumstances which permitted such broadcasts under Section 110(2)—the broadcasts of instructional programs for reception in classrooms, by disabled persons, or by government employees. As reported out of your committee, Section 112(b) made this clear, by allowing such recordings to be made by "a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a)" (emphasis added).

Senator Bayh's amendment removes this restriction, and allows the distribution of such recordings to any other governmental bodies or nonprofit organizations, whether they qualify under Section 110(2) or not. The amendment thus might allow a far greater free use of copyrighted works than the draftsmen of S. 1361 intended.

We did not object to a limited exemption, as set forth in the original draft of S. 1361, in the hope that this would speed general revision and thus be in the interest of all concerned. But we cannot accept the blanket exemption given by Senator Bayh's amendment, and so oppose its adoption.

There is enclosed an additional statement of Herman Finkelstein, who has retired as the Society's General Counsel, but continues to represent the Society as Special Counsel in matters pertaining to revision of the Copyright Law. The Society would like to have both his statement and mine considered by your committee.

Respectfully submitted.

STANLEY ADAMS, *President.*

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
New York, N.Y., February 3, 1975.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This statement on behalf of the members of the American Society of Composers, Authors and Publishers (ASCAP) is submitted in addition to that of the Society's President, Mr. Stanley Adams, pursuant to your invitation addressed to him to comment on the Amendments to S. 1361 introduced by Senator Charles McC. Mathias, Jr. (No. 1815) and Senator Birch Bayh (No. 1831), neither of which was called up during the Floor consideration of S. 1361, but which raise issues which, as you point out, will be considered during the further processing of the current Revision Bill, S. 22, which you introduced on January 15, 1975.

As Mr. Adams' statement points out, the Society opposes both Amendments. Let us first consider Senator Mathias' proposal.

I. THE MATHIAS PROPOSAL—AMENDMENT NO. 1815

The Amendment proposed by Senator Mathias should be rejected because it violates the spirit of the copyright clause of the Federal Constitution; it would deprive authors of the opportunity afforded to other Americans, including public broadcasters, to negotiate freely for the use of their properties or facilities. Although the Amendment would compel authors to suffer the use of their works on any public television or radio station or program without their consent, there is no way that an author can compel an unwilling public broadcaster to include one of the author's compositions in a particular program.

The Amendment would impede rather than encourage the dissemination of contemporary works on public television because there would be no direct dealings and exchange of views between authors and their associations on the one hand, and public broadcasters and their associations on the other, and because the costs imposed on both broadcasters and copyright owners under the proposed statutory method of licensing would be staggering and would necessarily raise the rates beyond any which would be arrived at in private negotiations.

Any increased cost resulting from the proposed statutory form of licensing will have to be borne by the taxpayers who subsidize public television or by the authors or both—an expense that arises only because of an imposed method of statutory licensing which benefits no one and is not needed or helpful to anyone. This would be contrary to the public interest because it would defeat the purpose of enacting copyright laws as a means of insuring fair rewards to authors, thereby encouraging them to create new works for public enjoyment. Authors in America do not ask for a public subsidy; by the same token they ask that the property they create be nutured and safeguarded under law to the same extent as that of the utilities who supply the electricity used by "public" broadcasters, the executives and managers who operate these "public" stations and networks, the national commercial sponsors such as Mobil Oil, Exxon, and Monsanto Chemical among others, and local sponsors such as banks who conspicuously advertise their generosity in supplying programs used by public television in order to appear as public benefactors, thereby improving their public images.

Now let us take a closer look at this Amendment. It is entitled: "*Limitations on exclusive rights: Public broadcast of nondramatic literary and musical works, sound recordings, and pictorial, graphic, and sculptural works.*"

The Amendment would provide for a compulsory license for the "production, duplication, interconnection, distribution, and transmission of 'educational tele-

vision or radio programs' by or for 'noncommercial educational broadcast stations' . . ." (Section (b)) A "public" television station could engage a private commercial enterprise to produce a program for it, and that commercial producer would be entitled to use the work of any composer without his consent at a rate to be fixed by the Copyright Royalty Tribunal. The works used may be songs from a Broadway play that is being considered for a motion picture. Indiscriminate broadcasting at such a time may destroy the value of a play for motion picture purposes. To avoid such damage, the existing agreement between ASCAP (on behalf of its writer and publisher members) and commercial broadcasters permits the writer or copyright owner to withdraw the work from any pending license issued to broadcasters in order to protect the dramatic or motion picture rights when necessary. The Mathias Amendment denies this right to authors. In fact, it denies the right to specify any conditions under which a work may be used by public broadcasters.

Existing blanket license agreements with broadcasters for musical compositions of members of ASCAP do not grant a license to the producer. At most, he is indemnified against an infringement suit resulting from the actual broadcast of the works. The producer must deal directly with the author or copyright owner if he wishes to obtain any rights in the works. There is no reason why those who produce shows for "public" television should be in any more favorable position.

Now let us turn to the expense of administering the system proposed in this Amendment. Section (a)(1) requires the "public broadcasting organization or institution" to do the following:

(A) File a notice of its intention to secure a license "at least one month before initial broadcast and thereafter at intervals . . . prescribed by the Register of Copyrights";

(B) Deposit with the Register from time to time "a statement of account and the total royalty fees for the period covered by the statement based on the royalty rates" (prescribed by the Copyright Royalty Tribunal).

Under Section (a)(2) the Tribunal is required to fix "reasonable royalty fees", to be "calculated on a per-use, per-program, pro rated or annual basis". It provides further that:

"In particular circumstances, royalty rates negotiated between one or more public broadcasting organizations or institutions and one or more copyright owners or agencies may be substituted for the applicable rates determined by the Copyright Royalty Tribunal."

Section (a)(3) provides for the distribution of the royalty fees deposited with the Register:

(A) Claims by copyright owners must be filed with the Register during July each year for the previous 12-month period.

(B) On August 1 of each year, the Register must determine whether there is a controversy "regarding the statement of account or distribution of royalty fees". If there is no controversy, the Register must distribute the fees to the copyright owners or their agents "after deducting reasonable administrative costs under this section". If there is any controversy, it is referred to the Copyright Royalty Tribunal, and in such cases the administrative costs of the Register are deducted before any distribution of fees by the Tribunal.

There may or may not be an interim distribution of fees not in dispute, subject to the Tribunal's discretion. Amounts may be withheld presumably to pay for the cost of determining the controversy as well as the actual fees to be paid to the contending parties.

Let us now try to see what all this means. First, the broadcaster must file a notice of intention to use at least one month before the initial broadcast. What must he list? Certainly, the title of the composition; and since many compositions have the same title, there must be a further description such as the names of the composer, author and publisher; or if a commercial record is used, the song title must be listed plus the name of the performer or the serial number of the record and the name of the record company in the case of companies having a regularly available catalogue. In addition, the program should be identified, giving the names of performers, the "institutional" sponsor, if any, and the date and hour of broadcast. If the station claims that a license for a particular use of a work is not necessary because the station claims that it is exempt under the doctrine of "fair use", that fact should be stated so that the claim may be disputed by the copyright owner and the matter referred to the Tribunal.

In order for a compulsory license of this type to be operable, the station must at the very least file a statement of all works actually broadcast by the station,

indicating the name of the program and date and hour of broadcast, and making available appropriate data as to costs in presenting the program, as well as all "credits" given to any industrial or commercial enterprise for supplying financial consideration or supplying the program itself.

Most commercial stations do not keep records of all their uses because they have negotiated a reasonable license that permits the copyright owners to apportion the amounts received.

Inasmuch as the maintenance of such records is too expensive and too unreliable to be undertaken by commercial broadcasters, it would be surprising if the budgets of public broadcasters provide for this. The expense of distribution is a substantial item and it is taken into consideration when commercial rates are determined. The system provided for in this Amendment is far more complicated, and would require the payment of substantial fees to cover the expense of distribution before determining reasonable compensation to authors. It would be interesting—and in fact indispensable—for your Committee to consider these costs before the wisdom of enacting the proposed Amendment is determined.

There are apt to be many disputes, possibly in the hundreds, as to what constitutes "fair use." The cost of presenting evidence on this subject—one of the most difficult in the field of copyright—is likely to be substantial. In the agreements negotiated with commercial broadcasters, in a spirit of avoiding costly controversy, there is no occasion for such a dispute.

Although the Amendment would seem to authorize negotiations independent of the statute, it limits such negotiations to rates only—and the payment must be channeled through the Copyright Office or the Tribunal in the manner prescribed in the Amendment.

In these days when everyone is trying to eliminate unnecessary costs and to simplify operations as much as possible, it is hard to understand this provision unless it is there to provide the money for a costly and wholly unnecessary administrative body. The cost is not to be assessed against the totality of taxpayers or charged against the funds allotted to public broadcasting. Apparently the sponsors of the Amendment expect the expense to come out of the author's royalties. The author must not only pay his taxes; under this Amendment, he must subsidize both a bureaucracy and the "public" broadcasters operating under a public subsidy, because they wish to whittle down the "exclusive" rights which the Constitution vouchsafes to authors.

The Amendment is not needed; it is contrary to the public interest; it would greatly enlarge the expense and paper work which have been kept to a minimum under negotiated agreements; it requires authors to subsidize public broadcasting, which is just the reverse of the situation in other countries where a substantial portion of the receipts of public broadcasting is paid to authors to encourage them to create new work for public enjoyment.

The Authors League of America has submitted a statement by its counsel, Irwin Karp, with respect to the impact of the Mathias Amendment on authors of literary works. There is no need to repeat the reasons for their concern. We endorse them.

We shall now consider the Bayh proposal.

II. THE BAYH PROPOSAL—AMENDMENT NO. 1831

This proposal is fully discussed in the statements by Mr. Adams and Mr. Karp. I wish to add only that an unregulated multiplication of tapes or films of broadcast programs will discourage copyright owners from cooperating with public broadcasters and counting on public television as a desirable medium for the presentation of their works.

The unauthorized duplication and distribution of motion picture films has been a problem in the film industry for many years. Yet *any* unauthorized duplication infringes the copyright. If a law is enacted that permits free duplication without the copyright owner's consent, there will be no means of preventing unauthorized distribution and use of those copies.

No greater duplication should be authorized or permitted than is absolutely necessary. Otherwise the statute will be an open invitation to piracy.

Turning to public radio, when the program consists of the broadcast of commercial records that are readily available, there is no reason for authorizing any further duplication.

There are many commercial FM radio stations that have less financial support than many public radio stations. There is no reason why any radio station broadcasting to the general public should have rights that are not expressly acquired from the copyright owners.

The proposed Amendment is discussed in further detail in the statements of Messrs. Stanley Adams and Irwin Karp, which will not be repeated here. Experience teaches that the Amendment proposes a dangerous course that should not be encouraged.

CONCLUSION

The writers and publishers represented by the American Society of Composers, Authors and Publishers urge that both Amendments be rejected.

Respectfully yours,

HERMAN FINKELSTEIN,
Special Counsel.

NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.,
New York, N.Y., January 30, 1975.

Hon. JOHN L. McCLELLAN,
Chairman, U.S. Senate Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, Washington, D.C.

DEAR SENATOR McCLELLAN: The National Music Publishers Association appreciates the opportunity presented by your letter of November 27, 1974 to express its position on the proposed compulsory license for public broadcasters put forward last fall by Senator Mathias as an amendment to S. 1361, the general Copyright Revision bill. We had thought the matter settled by your Committee, which carefully considered and specifically rejected an "amendment to provide a compulsory license and regulated rates for the use of copyrighted material in the programs of public television which are intended for reception by a general audience. . . .

"The programing of public television includes an increasing emphasis on programs of an entertainment or general culture nature. . . . Such stations may deserve greater financial assistance, but *they should not be subsidized by this country's creative talent.*" (S. Rept. 93–983, p. 128, emphasis added)

Your Committee urged copyright proprietors to undertake promptly "efforts to improve procedures whereby public television may secure copyright clearances" (id.); and, with respect to the synchronization rights of copyrighted music (the area of particular relevance to this organization), I can assure you of our members' fullest cooperation along these lines.

The Mathias Amendment thus represents an unwise and unwarranted solution to a non-existent problem. It would further diminish the free market in musical works by giving the Federal Government new authority as a price-fixer over an area now subject to frequent bargaining, and by giving the Federal Copyright Office an additional role as collector and distributor of royalties. No tribunal, however wise and impartial, can establish for each work of music a fairer rate than that established by untrammeled negotiations between the two parties directly involved.

The concept of compulsory licensing is anathema to the creative talent of this country. The holders of musical copyrights have been penalized by the statutory imposition of this approach since 1909 with respect to sound recordings, and are strongly opposed to its needless expansion. (It might be noted that the Register of Copyrights in his 1961 Report called for the repeal of the compulsory license requirement for musical recordings as an exception, no longer needed, to "the fundamental principle of copyright that the author should have the exclusive right to exploit the market for his work.")

A compulsory license was deemed necessary in 1909 for sound recordings to prevent one piano-roll company from gaining a monopoly. It has now been deemed necessary for juke boxes because the economic base of that industry had historically depended upon unobstructed access to copyrighted music. It has been deemed necessary for cable television in order to initiate an equitable system of compensation in a situation where the courts had ruled no compensation under existing law was due.

But no such compelling purpose has been alleged for the use of the compulsory license technique in this instance. No compulsory license is needed to prevent one public broadcaster from excluding all others, or to assure or commence either payment by public broadcasters to copyright holders or access on reasonable terms to their copyrighted material. No other compulsory license curbs, as the Mathias Amendment would curb, a pre-existing right of copyrighted proprietors to bargain freely in the marketplace. Nor would any other compulsory license permit, as the Mathias Amendment would permit, the public use of a copy-

righted work before the creator of that work has even decided whether and in what form he wishes to make it public. Surely we have not come to the point in this country where a composer cannot create and copyright a work for his own satisfaction and then decide for personal or economic reasons to withhold it from the public.

Surely it would be unthinkable to extend into public broadcasting this inevitably harsh and inequitable concept of compulsory government licenses and price-fixing in the absence of clear and convincing evidence of its absolute necessity. No information has come to our attention indicating that public broadcasters have been denied equal access on fair and reasonable terms to any and all the copyrighted musical material they have requested. Indeed the final sentence of subparagraph (a)(2) of the Mathias Amendment acknowledges the fact that royalty rates already can be and are negotiated between public broadcasters and copyright owners. Music publishers seek not a large monetary return from public broadcasting—no one has ever accused them of demanding exorbitant fees for such uses—but simply the right to bargain freely over the value of their product.

To be sure, musical copyright holders object to what your Committee rightly termed "the widespread public exploitation of copyrighted works by educational broadcasters and other non-commercial organizations" that are highly subsidized and clearly capable of paying royalties (S. Rept. 93–983, p. 112) for synchronization rights but have often failed to do so. Nor do they regard as a serious effort the public broadcasters' attempt to negotiate synchronization licenses through the American Society of Composers, Authors and Publishers (ASCAP), which may under its consent decree grant licenses for performing rights on behalf of its members but not for synchronization rights. Nor would a truly serious effort be confined to asking this Association (NMPA) for blanket licenses and fee schedules on behalf of all its members, licenses and schedules for which we have obtained no authority from our members and no exemption under the antitrust laws. Allow me to add that we do not seek the antitrust waiver offered by paragraph (a)(3)(A) of the Mathias Amendment, or think it necessary to facilitate clearances for public broadcasting.

For when one or more educational broadcasters does make a serious effort to obtain a license from an individual copyright proprietor, no obstacle is imposed. No uniform association approach is required. We know of no instance in which requested music licenses have been denied. We know of no reason why the same procedures and patterns by which thousands of musical licenses are negotiated and granted each year for use by commercial broadcasters, motion picture companies and others, large and small, national and local, cannot be applied with the same effectiveness to public broadcasting.

As stated several years ago by the Register of Copyrights: "Fully acknowledging the unique public value of educational broadcasting and its need for financial support, we must also recognize the large public audiences it is now reaching, the vast potential audiences that are awaiting it, and the fact that, as a medium for entertainment, recreation, and communication of information, *a good deal of educational programing is indistinguishable from a good deal of commercial programing.* The time may come when many works will reach the public primarily through educational broadcasting. In terms of good education it is certainly true that the more people reached the better; but in terms of the author's right it is equally true that the more people reached the more he should be compensated. It does not seem too much to ask that some of the money now going to support educational broadcasting activities be used to compensate authors and publishers whose works are essential to those activities." (See H. Rept. 90–83, p. 42, emphasis added)

Senator Mathias suggests that multiple negotiations with various copyright holders subject the public broadcaster to an unreasonable administrative burden requiring extensive staff. But the burden on the broadcaster under the Mathias Amendment—of maintaining all necessary records for the Register of Copyrights and periodically producing documented rate-making data for the new tribunal—will surely be equally onerous (to say nothing of the additional burdens created for these Federal agencies). Indeed, given our industry's experience in developing licensing patterns, our Association's willingness to locate for any applicant the apropriate copyright owner, and the availability of The Harry Fox Agency, Inc. as a licensing agent for some 80% of all music publishers, the private enterprise course should be substantially *less* administratively burdensome for the broadcasters than the public bureaucracy route. Certainly the private parties directly involved can reach a rate decision more quickly than a federal tribunal,

and achieve payment more efficiently than going through the Register of Copyrights as a middle-man. And given the minimal nature of those fees, it would be unconscionable to route them through the Register and thus require him under Sec. (a)(3)(B) to deduct his own administrative costs before distributing them.

In short, continuing and cooperative efforts by both public broadcasters and copyright proprietors will, as your Committee Report originally suggested, resolve any remaining impediments to speedy clearance and licensing; and this country's music publishers are offering and have always offered such cooperation. "... [I]f better clearance arrangements can be arrived at voluntarily," said Senator Mathias offering his Amendment, "the compulsory license requirements need not be preclusive." (Cong. Rec. 9–9–74, p. S16166) Although the Senator's informants have substantially exaggerated the complexities and disparities of the present clearance structure, we are certain that music copyright holders and their trade associations and licensing agencies will work with public broadcast representatives in any way necessary to improve the efficiency of existing arrangements for even the smallest producer of public broadcast programming.

Enactment of the Mathias Amendment will not save the public broadcasters money or time; it will not increase their access to copyrighted music; it will not decrease their administrative burdens. It is not needed, justified or desirable, and should be rejected by your Commtitee.

Sincerely,

LEONARD FEIST,
Executive Vice President.

NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.,
New York, N.Y., January 30, 1975.

Hon. JOHN L. MCCLELLAN,
Chairman, U.S. Senate Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, Washington, D.C.

DEAR SENATOR MCCLELLAN: The National Music Publishers Association is grateful for the opportunity presented by your letter of November 27, 1974 to comment on the amendment (No. 1831) introduced last year by Senator Birch Bayh during the consideration of S. 1361, the general Copyright Revision Bill. In the interest of expediting consideration of the general bill, the subject of "ephemeral recordings" has not previously been discussed by our representatives; but the Bayh Amendment is the culmination of a growing threat to copyright holders which deserves attention.

"Ephemeral", according to every standard dictionary, means "lasting for a brief time, short-lived, sharply limited in duration." The traditional concept of ephemeral recordings, the House Judiciary Committee Report of 1967 points out, holds them to be "mere technical adjuncts of broadcasting that have *no appreciable effect* on the copyright owner's *rights* or *market* for copies or phono-records." (H. Rep. 90–83, p. 60 emphasis added)

The original proposal on ephemeral recordings in the general copyright revision bill of 1965 met this definition. It would have permitted those broadcasting organizations already lawfully entitled to transmit a copyrighted work to make (without being guilty of a copyright infringement) *one* copy or recording for their own transmission within *six months*, such copy thereafter to be either destroyed or preserved for archival purposes only.

That was "ephemeral"; and as noted in both the 1967 House Judiciary Committee Report and the 1974 Senate Judiciary Committee Report on Copyright Law Revision, "The need for a limited exemption in these cases because of the practical exigencies of broadcasting has been generally recognized. . .". (H. Rept. 90–83, p. 59; S. Rept. 93–983, p. 135, emphasis added)

The House Judiciary Committee in 1967, after considering the testimony of educators and copyright proprietors, then permitted instructional broadcasters who pay no royalties for transmitting to classrooms and the like under Section 110(2) to make *two* copies for transmission within a period of *one year*. That was still "ephemeral"; and indeed the House Report emphasized that it was unwilling to "convert the ephemeral recording privilege into a damaging inroad upon the exclusive rights of reproduction and distribution." (H. Rept. 90–83, p. 60). Unfortunately an amendment on the House floor that was adopted without debate eliminated all limitations,

The initial report of the Senate Judiciary Subcommittee on Patents, Trademarks and Copyrights in December 1969 increased the number to *twelve* and the period of retention to *five years;* and Section 112(b) of S. 1361, reported in July 1974, increased these limits still further to *thirty* copies for *seven* years and permitted educational broadcasters to exchange recordings for transmission. Although we made no comment on this provision for the reasons stated above, Section 112(b), far from providing for "ephemeral" copies, would carve out a large new area of broadcasts from which copyright proprietors would be unable to receive compensation for their creative contribution. The Senate Report in fact noted the argument of the private enterprise producers of educational films that these recordings by instructional broadcasters "are in fact audiovisual works that often compete for exactly the same market . . . without paying any copyright royalties. . ." The Report concluded: "These arguments are persuasive and justify the placing of reasonable *limits* on the recording privilege." (S. Rept. 93–983, p. 137, emphasis added)

We respectfully suggest that the limits set forth in Section 112(b) go far beyond what is reasonable or necessary. Once 30 copies have been distributed, it will be difficult for the original distributor—and impossible for the copyright proprietor—to police their use and prevent or collect for infringements. Indeed the House Judiciary Committee in 1967 regarded *two* copies and *one year* as "reasonable limits" in the very same context. (H. Rept. 90–83, pp. 62–63)

Now the Bayh amendment, contradicting the language of both Reports, proposes to revoke all limits altogether, to deny to American authors, composers and publishers any compensation whatsoever in one of the important and rapidly growing markets for their work. (Indeed its language does not even clearly limit to instructional uses the transmissions made by those who would receive copies from the instructional broadcaster.)

Educational broadcasting is now a big business, raising and spending large sums for performers, producers, technicians, executives and others, none of whom are asked or expected to contribute their services. We have no objection to an amendment to the present statute permitting instructional telecasters to faciliate their task by making a very limited number of truly ephemeral copies. But it would be patently unfair for the Congress, by adopting the Bayh amendment or even Section 112(b) in its present form, to single out the creators of copyrighted works as the only participants in an instructional telecast who are to be uncompensated for their contribution.

We do not believe that the Congress will knowingly agree to allow one substantial class of users to expropriate without compensation the property rights of the nation's creative talent.

Sincerely,

LEONARD FEIST.

THE AUTHORS LEAGUE OF AMERICA, INC.,
New York, N.Y., January 28, 1975.

Re Senator Mathias' Amendment—No. 1815

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommitee on Patents, Trademarks and Copyrights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR CHAIRMAN MCCLELLAN: The Authors League of America, the national society of professional writers and dramatists, appreciates your invitation to submit comments on Senator Mathias' Amendment to the Copyright Revision Bill, to permit unauthorized uses of certain copyrighted works by Public Broadcasters. The Authors League strongly opposes this Amendment which would inflict serious injury on authors.

Purpose of the Amendment

The Amendment would allow public broadcasters to expropriate copyrighted books and other non-dramatic literary works for incorporating in television and radio programs, under a compulsory licensing system. It would permit broadcasters and producers to use these works without their authors' permission and despite their objections. Compensation for these unauthorized uses would be fixed by a "Copyright Royalty Tribunal."

Summary of Objections

The Authors League opposes the Amendment because:

(i) It destroys the author's fundamental right to determine when, by whom, and under what conditions his book or other work may be used; and thus

prevents him from protecting his work's integrity and his reputation (discussed at p. 3); and

(ii) It would inflict great economic injury on authors: (a) by preventing them from licensing uses of their works by motion picture companies and non-subsidized broadcasters and producers and (b) by denying them adequate compensation for public broadcasting uses of their works (discussed at pp. 3–4); and

(iii) It permits public broadcasting organizations, producers and officials to exploit, for their benefit and economic advantage, the author's name, reputation and work. But public broadcasters are no more entitled to thus expropriate an author's book than to conscript directors, actors or announcers, or equipment and supplies, at salaries or prices fixed by "compulsory licensing." (pp. 4–5)

Authors Will Be The Victims

Most established authors of novels, biographies, histories and other works on subjects of general interest such as economics, sociology or the arts own the rights to use their works in television, radio and motion pictures, and receive the income from these uses. Their publishers neither control these rights nor receive any of the proceeds from them. Consequently it is thse authors, and not their publishers, who will be injured by the Amendment.

Copyright Does Not Prevent Public Broadcasting from Doing its Job

Nothing in the present Copyright Act or the Copyright Revision Bill passed by the Senate last fall prevents any public broadcaster from producing or broadcasting a program on the same subject matter that is dealt with in a copyrighted book. If a public broadcaster wishes to do a documentary on General Stillwell's career, it is not barred from doing so by Barbara Tuchman's copyright on her biography of the general. The public broadcaster is free to use the same sources, narrate the same facts and describe the same events reported in the copyrighted book. All that the copyright does is prohibit the public broadcaster (or anyone else) from substantially copying the author's expression of the material rather than independently writing its own script for its program. In addition, public broadcasters have the privilege of quoting and borrowing material from the book under the doctrine of fair use.

Thus, the Amendment is not required to permit the production of public broadcasting programs on any subject. Its real effect will be to allow broadcasters and producers to expropriate an author's book on any subject rather than do their own creative writing; to also expropriate his name and reputation; and to injure him severely in the process. And in many instances, the Amendment will substitute expropriation and low "fixed prices" for voluntary negotiations with authors. Many writers would be willing to license the use of their books by public broadcasters provided reasonable compensation is paid and acceptable conditions are negotiated.

But compulsory licensing is totally unjustified where the author declines to license uses of his work by public broadcasters. As indicated below, such a license may cause him great financial injury. Or he may decline a license to protect his book from being mutilated or his reputation from being damaged. His decision does not prevent the broadcaster from producing a program on the subject dealt with in his book. Nor does it prevent a broadcaster from negotiating voluntary licenses with other authors. And there are plenty to choose from—more than 30,000 books are published in this country *each* year plus many thousands more than this abroad.

Injury to the Author's Reputation and Work

The proposed Amendment would destroy the author's fundamental right to determine when, by whom, and under what conditions his copyrighted book may be adapted and used in a medium that reaches millions of people—public television. The destruction of this right would prevent the author from protecting the integrity of his work against mutilation or an inferior adaptation, and from protecting his reputation against the serious injury a misuse of his work would produce. A book may not be suitable for television, or for the type of program for which it could be expropriated under the Amendment. The author may believe that the public broadcaster who elects to expropriate his book under the Amendment is an incompetent who will destroy his work's integrity and his reputation by an inept adaptation and production. The Amendment would deny the author the protection he has under the Revision Bill, and under the present law the right to refuse to license that broadcaster to use—and mangle—his work.

The Economic Injury to Authors

The Amendment would prevent authors from licensing the use of their works in motion pictures and television programs produced by the networks, commercial stations and other non-subsidized producers. Once a book has been adapted for a public broadcasting program and shown to millions of viewers, commercial broadcasters or film companies will not invest large sums to produce a second version. Moreover, the threat that a subsidized public broadcaster can expropriate a book at any time will foreclose commercial producers from acquiring rights in it; for they would not risk the heavy expenditures of a television program or film to be faced with a competing "public" version produced without the author's consent under the expropriation machinery of the Amendment. If adopted, it will inflict enormous injury on authors, depriving them of an important source of income.

Moreover, the compulsory royalty plan to be established by the Amendment would deprive authors of reasonable compensation for the use of their books on television and radio. A royalty copyright tribunal is not capable of establishing such compensation for this major use of literary works. The economic situation is radically different from that involved in establishing rates for "small" performances of music on television or radio, or recording fees for phonograph records. The performance of music is, and can be, licensed on a "non-exclusive" basis, since one performance or recording does not preclude other performances or recordings. The public will listen to dozens or hundreds of different renditions of the same song over the years. But one television program based on a book usually is all the market can absorb. Moreover, the fee for a three-minute recording or performance of any two songs is not likely to be very different in a free market. But the value of rights to produce a motion picture or television program based on two different books can vary by thousands, even hundreds of thousands, of dollars. The film or television rights of one book will be worth far more than the rights in another work. The compulsory license/royalty tribunal plan in the Amendment could not establish reasonable compensation for the rights in individual books; it would lower the author's compensation for television uses of his book to the lowest common denominator, causing vast injury.

Public Television Organizations and Officials Should Not Be Granted This Power of Expropriation

It should be emphasized that public television is not an eleemosynary institution. Officials of public television stations, producers of public television programs, directors, actors, announcers, and technicians are paid for their work. Officials and producers receive substantial salaries. Unions of announcers, actors, and technicians bargain collectively for reasonable compensation, and strike when their demands are rejected. No statute permits the public broadcaster to expropriate the services of these people at wages fixed by a "tribunal". On the average, those working in the vineyards of public television are much better compensated for their efforts than are the authors whose books would be expropriated under the Amendment.

It should also be emphasized that public broadcasters and producers spend large sums to create many of their programs, which they then copyright and exploit as property under the Copyright Act. Public broadcasting programming has been financed by millions in grants from the federal government and the foundations, and by large payments from EXXON, MOBIL, XEROX and other giant corporate advertisers. The so-called "grants" from these corporations are indeed payments for the institutional advertising they obtain on the programs and in associated newspaper and magazine advertisements for the programs. The credits mentioning these corporations on the television programs are no different than the original format of radio advertising, when the corporate sponsor simply identified itself, and did not include any "selling" message to mar the good will it obtained by providing the money to make the program possible.

Public broadcasting officials, producers and others in the establishment will benefit from the power to expropriate authors' works which would be placed in their hands by the Amendment. The success of their programs has a direct effect on their future compensation and careers. The more successful their programs, the more likely they are to command better salaries, obtain, new assignments and receive larger grants from the government, foundations, corporate sponsors and listener subscriptions. They have a definite stake and motive in improving their programs by using the works, names and reputations of authors of books and other non-dramatic literary works who would be the victims of the Amendment.

As we have noted, the compulsory licensing of television rights in books would permit public broadcasters and producers to appropriate wholesale the author's work, rather than do their own creative writing; and to seize the work at prices far lower than its reasonable value. Moreover, the expropriation machinery of the Amendment gives the broadcaster the opportunity to present the program as based on the work of the author. This permits public broadcasters and producers to trade on the name and reputation of a prominent author or book, to obtain greater recognition, publicity and audiences than they would receive if they created an original program.

Public broadcasters and producers are not permitted to expropriate copyrighted books or other literary works under the Revision Bill. They are not permitted to expropriate these works, or the author's name or reputation, under the present copyright law (The adaptation of a book for a program broadcast on public television stations would infringe the author's rights under Sec. 1 of the current Act: to dramatize it [1(b)], to make a transcription or recording [1(c)], to make a copy [1(a)], to present a non-dramatic version for profit [1(c)], to publicly perform a dramatic version [1(d)].)

The Authors League respectfully urges the Judiciary Committee to reject the Amendment, for the reasons stated above.

Respectfully yours,

IRWIN KARP,
Counsel.

THE AUTHORS LEAGUE OF AMERICA, INC.,
New York, N.Y., January 28, 1976.

Re Senator Bayh's Amendment—No. 1831

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR CHAIRMAN MCCLELLAN: The Authors League of America appreciates your invitation to submit comments on Senator Bayh's Amendment to the Copyright Revision Bill. For the reasons discussed below, the Authors League strongly opposed the Amendment. The Amendment would permit unlimited recordings of instructional programs which make uncompensated use of copyrighted books and music. The Authors League urges its rejection because: (i) it would inflict heavy injury on American authors and publishers by vastly increasing the overly-broad privileges of broadcasting copyrighted books and music without compensation, which will be permitted under Sections 110 and 112; and (ii) its ambiguous language may, inadvertently, permit recordings to be used for broadcasts which are not exempt under Sec. 110.

At the outset, it should be noted that instructional broadcasting is not hindered by the Revision Bill. In addition to the broad privileges granted by Sections 110 and 112, it has considerable free access to copyrighted materials under the doctrine of fair use. Moreover, much of its programing is created by it, or for it—often by salaried employees—and is copyrighted by the instructional broadcasters and program producers. Finally, it must be emphasized that instructional broadcasting is *not* an eleemosynary enterprise. Teachers, actors and announcers, directors, producers and executives are paid for their services in producing, recording and broadcasting the programs embodying an author's copyright book or music. Their unions strike for higher wages. They will probably even receive "royalties" for some repeat uses of the recordings and broadcasts which are made under the privilege of expropriation granted in Sections 110 and 112. Nonetheless, some educational broadcasters and program producers demand that Congress give them the unlimited power to expropriate authors' literary property, without compensation, for their enterprises—no matter how substantial the use, no matter how vast the audience that is reached.

(*i*) *The Amendment Permits Wholesale Expropriation of Authors' Works by Producers of Educational Programs*

Sec. 110 of the Revision Bill would permit the broadcasting of copyrighted literary and musical works in instructional programs without compensation to authors—when transmitted for reception in classrooms, or by disabled persons or government employees. The adverse impact of these free uses on authors is somewhat limited in the case of "live" broadcasts, since these reach limited audiences and are "ephemeral". However, Sec. 112(b) would greatly expand the scope and damaging effect of the privilege by allowing the recording of these programs, and the distribution of copies to other broadcasters.

This new recording privilege, which is not provided in the present Copyright Act, vastly enlarges the audiences for these broadcasts of the author's work. And it encourages more, and increasingly substantial, uses. The more recordings permitted, and the longer the period of their use, the greater the damage to the author and publisher of the work.

The Revision Bill drawn by the House Judiciary Committee permitted only *one* recording of a program to be made for transmission purposes, for *one* year; it permitted another copy to be kept only for archival purposes. These limitations reflected a concensus of opinion developed at the hearings and in discussions between authors, publishers and broadcasters that if instructional broadcasters wanted to reach audiences greater than those sizeable ones permitted by the new provisions, they should make some payment to the author and publisher of the copyrighted work they wished to broadcast. These limitations were removed by a floor-amendment which was adopted without debate, and without any opportunity for authors and publishers to explain to 500 Representatives who had no knowledge of the subject why the limitations on the new recording privilege were necessary and fair.

The Senate Judiciary Committee has been far more generous to educational broadcasters than was the House Committee. The Senate Bill initially allowed, in Sec. 112(b), the making of 12 recordings of a program, for use over a five year period. We think this went too far; but we did not object, hoping that accommodation would help produce a viable new Copyright law. In its recent mark-up of the Bill, the Judiciary Committee expanded the recording privilege to 30 copies, and a seven year period of use. We submit this was completely unwarranted. But Amendment No. 1831 cannot be justified by any standard of equity. If an instructional program producer or broadcaster wants to reach audiences even greater than those permitted by the 30-copy limit, he should pay the author who provides the primary ingredient for the program—the literary work which is being transmitted. Certainly the author has as much right to be compensated as do the teachers, actors, directors, technicians and production officials—who are paid for their services in recording and broadcasting the author's work. The Authors League urges that Amendment No. 1831 be rejected.

(ii) The Amendment Inadvertently May Expand The Scope of the Privilege Granted in Sec. 110

Section 112 only intended to allow the use of recordings for transmissions which are permitted under Section 110—i.e. the broadcast of instructional programs *for* reception in classrooms, or by disabled persons or government employees. However, the last sentence of the Amendment allows the distribution of copies for transmissions by or through other governmental bodies or non-profit organizations, without providing that such transmissions may only be made for the purposes specified in Sec. 110. This sentence might be read to permit a vastly broader uncompensated use of copyrighted material than the draftsmen of Sections 110 and 112 ever intended. It is clear from the text of the Bill and the Committee report that the recordings made under 112(b) should only be used for the types of transmissions stipulated in Section 110. The Amendment could frustrate that intention. The Authors League urges that this should not be permitted.

The Authors League urges that the Amendment be rejected by the Judiciary Committee.

Respectfully yours,

IRWIN KARP,
Counsel.

STATEMENT OF BROADCAST MUSIC, INC.

I am Edward M. Cramer, President of Broadcast Music, Inc.

It seems clear that any proposed legislation should be subjected to one basic question:

What problem or problems is this law designed to correct?

Measured against this yardstick, the answer concerning the proposal before us, the so-called Mathias amendment, is: none.

Public broadcasters have expressed their support of this proposal based upon the undefined possibility that they *might* undergo difficulties in obtaining the right to use music over public broadcasting stations and encounter obstacles in securing synchronization rights.

Since its founding in 1940, BMI has dealt with all classes of music users and come to good, workable agreements with all of them. It is not BMI's role to create problems for any potential user of the music we license. It *is* our role to facilitate the use of our repertory and to protect the interests of our affiliated writers and publishers. Based upon past performance, there is no reason to believe that discussions and negotiations with public broadcasters would be conducted any differently. But the fact is that representatives of public broadcasting have refused repeatedly to have meaningful discussions on the subject with BMI.

For your consideration, I have attached copies of letters addressed to Mr. Henry Loomis, President of the Corporation for Public Broadcasting, written in March and May of 1974, in which I requested meetings with representatives of CPB to explore the terms for a licensing agreement. To date, I have not received the courtesy of a reply.

It is ironic that during the same period I was unsuccessfully trying to talk with CPB and public broadcasting officials, I was able to meet with representatives of the Soviet Union in New York and in Moscow. In these meetings we were able to take meaningful steps toward arrangements for the compensation of American music when it is played on stations in the U.S.S.R.

Any question about the ability of public broadcasting and the music licensing organizations to arrive at an understanding was eliminated as a result of recent negotiations held under the auspices of the Senate Subcommittee starting in mid-April of this year. These negotiations showed that there are no real problems in obtaining the rights to use music; there are no real problems in the mechanics of payment to writers and publishers. The sole problem, as far as BMI is concerned, is reasonable payment for the use of music. The reason no agreement has been reached is that public broadcasters have failed to make a proposal of payment that BMI, as the proprietor of works of over 30,000 American composers and 10,000 publishers, as well as tens of thousands of foreign authors and publishers, can accept in good conscience for the people we represent.

Rather than hard negotiation and a frank discussion of the value of music to public broadcasting and of fair compensation to creators for the use of their property, public broadcasting has chosen a different track—special legislation.

In essence, the public broadcasters make the proposal that *all* music suppliers receive a total of $300,000 a year for the first two years, with small increases thereafter. Specifically, BMI and its chief competitor, ASCAP, would each receive approximately $90,000 a year to begin with. Another $90,000 would go to the publishers for synchronization rights, and $30,000 to SESAC. For the use of the BMI repertory—roughly 1,000,000 works—this comes to less than $1 per station per day.

It should be noted here that BMI music is the most widely performed over commercial broadcasting systems. Too, I believe that the music licensed by BMI is performed as much or more than any other music used without compensation over the public broadcasting stations.

A fair question might be this: If BMI has received nothing for its music in the past, is not $90,000 a year a marked improvement?

The answer is no, for even with this new income BMI would continue in the position of the shopkeeper who loses money on every sale but justifies his continuing in business in the hope of making up the difference in volume.

Let me explain.

Under the proposal, BMI, in order to pay its affiliated writers and publishers, will have to determine what music is played (a) on the networks, (b) on some 200 TV stations and (c) on approximately 155 radio stations. In addition, records will have to be kept to assist the Harry Fox office in making payments to its publisher clients.

Estimating conservatively, I would think that the cost of distributing the $90,000 will exceed half that amount.

Another factor: because of the heavy use of music from abroad (basically, the material that comes to us from England: the Monty Python Show, A Family at War, Upstairs/Downstairs, etc., and other foreign films and shows that are seen on public TV outlets) BMI will have the obligation to pay the foreign licensing societies with which we have agreements. If you subtract the monies payable to these foreign authors and publishers, there will be little or nothing left for American creators and publishers.

Under the circumstances, BMI will be forced to continue to subsidize the payment for performances over public broadcasting facilities. It should be stressed that this subsidy would come from the pockets of the other publishers and writers whose works we represent.

Could this proposed legislation have an effect on our relations with other countries? I think the answer is yes, and I would like to clarify the point.

BMI has reciprocal agreements with authoral societies in 34 countries. Payment is made to American writers and publishers when their works are performed over public broadcasting outlets, except in the U.S.S.R. and, as noted, I have reason to believe that this will soon change so that even there, Americans will be paid for performances on the state facilities.

There is a favorable balance of trade for the U.S. of about $8 million or $9 million per year. The failure of our licensing colleagues abroad to receive payment in several areas, including public broadcasting, has been a continuing source of embarrassment to us. In the past we were able to say that the situation will be changed when the copyright law is revised.

The public broadcasting proposal is virtually meaningless and will result in little income to any foreign supplier of music. It could, indeed, have a serious adverse effect. Some of these countries could very well carry out their threat to cut back payments to Americans for performances.

As mentioned, BMI and its colleagues from other countries of the world are on our way to an agreement with the Russians whereby they will pay for performances on their state facilities. Both BMI and these licensing societies would be shocked if the Russians simply offered to pay an amount equal to that which Americans pay for public broadcasting performances.

History shows that there are no obstacles to the successful conclusion of an agreement between the public broadcasters and the music licensers. The sole problem is how much public broadcasting is prepared to pay for the music it uses so lavishly. Public broadcasters have no difficulties in negotiating with a wide spectrum of suppliers of goods and services. When compelled to do so, these broadcasters have worked out agreements with the musicians union, various craft unions, employees, landlords, AT&T and others.

Yet, given this history of negotiation, public broadcasting petitions Congress for special legislation because it might be unable to deal with the suppliers of music. While negotiations with others have involved vast amounts, a settlement with music suppliers would involve comparatively small outlay.

The plain fact is that public broadcasters have not been able to come to an agreement with those who supply music because they have never tried to do so. So they want to fall back upon a compulsory arbitration mechanism to allow themselves the luxury of avoiding negotiation.

There is no need for me to comment on the elaborate machinery set up by way of the Copyright Royalty Tribunal because the simple answer is that such a body, with its heavy attendant administrative costs, is not necessary to handle this issue.

In closing, I note that as a taxpayer I am embarrassed to have to come before this body to argue whether an offer of $90,000 a year is adequate compensation for the music BMI represents. The expenses incurred by all, not to speak of the time and energy expended, has far exceeded this amount even in the past few weeks.

It is obvious that what is needed is not more, but less legislation. If the parties, for whatever reason, are unable to arrive at an understanding, the resort to legislation, a petition to Congress, is always a possibility. Until the parties involved make every attempt to solve this problem in negotiation, I submit there is no justification for legislation.

Before concluding my remarks, I note that the Subcommittee will also consider today the so-called Bayh amendment. Because of the limits of time allotment, I will not elaborate on our opposition to this amendment, but, instead, will submit, with the Subcommittee's permission, our written statement for the record.

Thank you for allowing me the opportunity to express our views on these matters.

BROADCAST MUSIC, INC.,
New York, N.Y., March 7, 1974.

Mr. HENRY LOOMIS,
President, Corporation for Public Broadcasting,
Washington, D.C.

DEAR MR. LOOMIS: As you may know, Broadcast Music, Inc. (BMI) is the largest musical performing rights organization in the world. Most of the music heard on radio and television in the U.S. today is licensed by BMI. Sixteen of our affiliated composers who write primarily contemporary concert music are Pulitzer Prize winners.

As recently as about a year ago, represenives of BMI met with representatives of CPB and PBS to discuss a license agreement. There had been a number of meetings prior thereto. We were to receive word from representatives of CPB concerning a future meeting date when a definitive proposal was to be made.

In the intervening period, we heard nothing until about four weeks ago when I learned that CPB had made an arrangement with our competition. We still have not heard directly from CPB. I must say that I am somewhat puzzled over the position taken by CPB in its apparent attempt to ignore BMI, which is the major supplier of music now on the air.

When I learned of the agreement with our competitor, I tried to reach Keith Fisher. I called at least three times and left messages, which included my identification. I have not received a return call from Mr. Fisher.

I'm sure you will agree that it is in the public interest that composers whose works are used on public broadcasting receive compensation like all others whose works are used. I look forward to hearing from you so that we can arrange for representatives of our organizations to meet and discuss the terms of a license agreement.

Very truly yours,

EDWARD M. CRAMER.

BROADCAST MUSIC, INC.,
New York, N.Y., May 16, 1974.

Mr. HENRY LOOMIS,
President, Corporation for Public Broadcasting,
Washington, D.C.

DEAR MR. LOOMIS: On March 7, 1974, I wrote to you. A copy of the letter is attached. The sentiments expressed in that letter are the same as they were then, except that we now have seventeen Pulitzer Prize winners affiliated with us.

I am sure that you are aware of the fact that absolutely nothing has happened in the intervening period. I did receive one phone call from a representative of CPB. I made several attempts to reach him, without success.

I cannot understand the position of your organization in refusing to discuss a matter of this importance with us. We represent 30,000 American writers and composers; nearly 10,000 publishers; and tens of thousands of writers and composers from abroad. I do not take the failure to respond as a personal affront; rather, it is an insult to those people whom we represent.

This week I have had meetings with representatives of the Soviet Government, at their request, looking forward to reciprocal arrangements which would include the compensation of American composers whose works are performed over Soviet broadcasting facilities. It is indeed strange that I can discuss payments for American composers on Soviet public broadcasting, and find that I am unable to locate anyone in a responsible position with the CPB who is prepared to discuss similar problems.

Please let me know if discussions are out of the question, because if this is the case, then we will have to take our case to another forum.

Very truly yours,

EDWARD M. CRAMER.

STATEMENT OF BROADCAST MUSIC, INC.

Broadcast Music, Inc. (BMI) is the largest of the U.S. performing rights licensing organizations. Most of the music performed by broadcasting stations is licensed by BMI. As the representative for over 40,000 writers and publishers from every state in the Union, BMI must stand opposed to the so-called Bayh amendment for reasons outlined below.

Although we recognize that the thrust of such amendment is principally applicable to a nonmusic context, we are against any proposal which tends to weaken the rights of copyright owners and which stifles or penalizes their creativity.

If Congress is disposed to allow photocopying by educational or other nonprofit organizations, we submit that the 30-copy and 7-year rules (which we feel are very generous concessions by Congress to the educational and scientific sectors) are better than the unlimited approach proposed by Senator Bayh. Such rules should adequately serve any legitimate educational or scientific needs, whereas a no-limit rule would cause unnecessary financial hardship to authors and publishers. Users of copyrighted works have the right of "fair use". However, unlimited photocopying without reasonable compensation is not "fair use", it is expropriation.

The above is in summary form and we would be pleased to submit, in writing or at a hearing, any additional comments or information which the subcommittee may desire. We, of course, would like to reserve our right to comment further as the legislative process on copyright matters unfolds in the 94th Congress.

Thank you again for giving us the opportunity to present our comments.

Respectfully,

BROADCAST MUSIC, INC.,
EDWARD M. CRAMER, *President.*

[Subsequent to the hearing the following correspondence was received for the record:]

BROADCAST MUSIC INC.,
New York, N.Y., September 10, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER: BMI would like to comment on the background statement filed with the Subcommittee on Courts, Civil Liberties and the Administration of Justice by the Association of Public Radio Stations.

Inasmuch as the document was prepared prior to the July 10th hearing before the Subcommittee it is understandable, but regrettable, that it contains a number of assumptions which run counter to fact.

There is no problem of the clearance of musical works for use in nationally distributed programs, or, indeed, for use in local programs. The fact is that APRS can, as commercial stations have been doing for decades, obtain immediate blanket clearance of copyrighted music through easily negotiated licenses with the performing rights licensing organizations. The fact is that APRS will need no added personnel to perform a clearance function, for such a function will not exist.

There is no intention on BMI's part to charge such exorbitant fees as are cited by APRS. The fact is that BMI's lowest rate for commercial broadcasters is $18 a month, a far cry from the APRS bogey of $15,000 to $20,000 annually. BMI has already told representatives of Public Broadcasting that we are ready to discuss an equitable rate. Toward the establishment of such a rate we have asked for data concerning rates charged by the owners of other rights equally necessary to programing.

There is no serious problem of administrative burden placed on APRS after the negotiation of a BMI contract. At most we would require, as we do of other broadcasting licensees, a log of the music played for one week each year. Many stations already make this sort of information available to their listeners on a regular basis. This has been provided us by commercial stations with personnel even lesser in number than the average eight full-time employee programming staff APRS cites. The fact is that such an obligation is thoroughly in keeping with APRS' stated and laudable "obligation to the composer of our time." Fulfilling this simple responsibility will assure that these composers of our time receive money for the public performance of their music on public radio.

Public Radio does, indeed, "make potential record buyers aware" of contemporary music. But this can also be a dubious blessing. The potential average sale of contemporary recorded concert music is about 2,500 copies. When APRS, "one of the few outlets for the work of young contemporary composers," schedules such music, tape recorders and cassettes whirl. That performance is bootlegged for personal use, generally reducing sales. The payment by APRS for a license from BMI will certainly not end this reprehensible practice, but it will slightly alleviate an economic wrong.

We can only repeat the points we made on July 10th at the hearing before the Subcommittee:

Public broadcasting will have no difficulty in negotiating a contract.

Public broadcasting will have no serious financial burden placed upon it.

Public broadcasting will have no serious administrative problems arising from reporting one week's music programing a year.

The sole problem is how much public broadcasting is prepared to pay for the music it uses so lavishly.

Respectfully,

EDWARD W. CHAPIN,
Counsel.

Mr. KASTENMEIER. Mr. Korman.

Mr. KORMAN. Mr. Chairman, with respect to the question of Senate action, the Senate subcommittee rejected both amendments. The subcommittee on the Senate side rejected the Mathias amendment unanimously and rejected the Bayh amendment 4 to 1.

Mr. KASTENMEIER. Are you referring to last fall or recently?

Mr. KORMAN. I am referring to June 1975, within the last month.

All our organizations, ASCAP, SESAC, AGAC, and NMPA oppose the Mathias and Bayh amendments for the reasons given in full written statements being filed today. We ask that these statements be printed in the record. Each of us is prepared to answer any questions you may have.

Briefly, Mr. Chairman, we think the Mathias amendment is ill-conceived and unnecessary.

We appreciate the need of the public broadcasting industry, like other bulk users of music, for ready access to copyrighted music. We have tried to do everything possible to accommodate that need. We intend to continue to cooperate and we do not have to be ordered by statute to do so.

We think it would not be in anyone's interest for the Government to get involved in the decision as to what fees the public broadcasters should pay for music. The Government does not tell us what to charge other broadcasters; it does not tell public television what to pay for other services; and there is no reason why we and the public broadcasting industry cannot work this out ourselves.

As you may know, the Senate Copyright Subcommittee a short time ago brought all the parties together and urged us to come to agreement on a mutually satisfactory procedure that would make copyrighted works available to public broadcasting without a compulsory license or Government price-fixing.

Those meetings are proceeding with remarkable progress, particularly with respect to music. I am submitting for the record the Senate subcommittee's recent report, dated June 13, 1975, on this progress.

At our last meeting only 2 days ago we made a proposal to the public broadcasters which they agreed was very close to the licensing structure they seek. Unfortunately they are unable to respond promptly because of vacation schedules and the fact that their board members are widely dispersed.

We have made our proposal in the interest of a more harmonious relationship, even though very frankly we have no doubt that any objective determination of music's fair fee from public broadcasting would produce a much higher return than the fee we are now seeking.

Given good faith on both sides, I have no doubt that agreements can be signed promptly granting easy, economical access to copyrighted music to public broadcasters. We shall not take time to wrangle over who is to blame for not working this out sooner.

The important fact is we are working it out now.

Does anyone really believe that a compulsory license system administered by the Copyright Office and a price-fixing process administered by the Copyright Royalty Tribunal, could do better? Could adversary proceedings before a tribunal or even this committee possibly produce a better judgment than the parties themselves on what a particular song or catalog is worth?

Could the suggested statutory compulsory license possibly assure public broadcasters the same enthusiastic cooperation in expediting clearances as would a voluntarily negotiated procedure? We think not.

To provide the books and records that will be required under the proposed amendment by the Copyright Office and the Copyright Royalty Tribunal will be far more burdensome on public broadcasters than the simple procedures we are now working out with them.

To cover the Government's cost of administering such a system, and still leave a fair return for copyright holders, will require far higher fees from public broadcasters than those under discussion in our meetings.

Even if for some unforeseen reason, some act of bad faith or intransigence, these current negotiations should unexpectedly collapse, there would still be no need to resort to Government compulsion. All of our organizations and members over the years have routinely granted licenses to a myriad of music users and stood ready to accommodate public broadcasters.

We want our music to be broadcast, the more often the better, on public as well as commercial stations.

Perhaps our procedures can be improved and our forms simplified but there is no need for the Government to intervene and force us to sell our services to public broadcasters any more than it forces other providers of goods and services to do so.

Public television, after all, is for us an important market, growing larger and increasingly well financed, with 1973 gross revenues reaching $250 million. Let me digress a moment, Mr. Chairman. I was coming back in a cab yesterday and found myself in the company of one of your constituents. He was a man who runs the public television network in Wisconsin. He had been a commercial broadcaster before. He said he saw no reason why public broadcasters should not pay license fees or why there should be any problem with reaching a fair agreement. We agree with him.

Because our organizations and members have both a personal belief and an economic stake in the advancement of American culture and music we are delighted that many of this country's largest corporations have chosen to enhance their image by financing quality entertainment and other programs on public broadcasting.

We realize that some public broadcasters, like some commercial broadcasters, are better situated financially than others. But the tremendous growth in the number and revenues of public stations, and their increased reliance upon nationally produced and distributed programs of mass entertainment, have borne out the concern expressed by Chairman Kastenmeier and Congressman Poff in the 1965 hearings that public TV, then called educational TV, would become less and less distinguishable from the commercial stations over whom they seek an advantage.

One final word regarding precedents. In no way is this situation comparable to those involved in other compulsory licenses in the pending copyright bill. The Congress has never established a compulsory license in place of a preexisting right on the part of copyright owners to bargain freely in the marketplace.

Compulsory license provisions are now being added for jukeboxes and cable television because copyright owners have not previously been

given any compensation for these uses and such licenses are an integral part of carefully constructed compromises. But public broadcasters have always been obligated to pay copyright music license fees.

Unfortunately, they have not always done so.

In 1909, a compulsory license for sound recordings was established when that new right to license was given to music copyright holders. That provision for better or worse may now be too well entrenched to eliminate, but its original purpose was to prevent one piano roll company from monopolizing exclusive rights to all the best music.

Obviously, no one today is afraid that one public broadcaster will tie up all copyrighted music to the exclusion of other public broadcasters.

Were there any valid reasons for the Mathias amendment, we would take time to point out to you today the dangerous ambiguities, inconsistencies, and impracticalities in its present wording. But because the parties on their own can achieve its goal much more economically and efficiently, we cannot believe this amendment will be adopted.

The present series of meetings to assure public broadcasters of prompt access on reasonable terms to copyrighted music will continue. You have our pledge of continued good faith in those negotiations. We ask merely that you not supersede them with a compulsory statute but encourage them with your blessing.

At this point, I wish to refer to the Bayh amendment briefly.

I would like to simply add that the groups for whom I am speaking all oppose the Bayh amendment for the reasons given in our statements. We have seen Mr. Lieb's statement and we concur in it.

Rather than say anything further on that amendment, we wish it to be understood that we take the same position as the book authors and publishers do. Thank you for your consideration of our views.

Mr. KASTENMEIER. I don't like to interrupt the presentation but there is a point of difference of understanding. It is your position from what you said that presently public broadcasting is not exempt from payment of royalties from nondramatic literary works, from rendering performance of music, or from presentation of photographs on the theory that they are not instructional?

Mr. KORMAN. What the public television people do constitutes a public performance for profit today. When you have Exxon or Mobil or any of these corporations flashing on the screen that this program is made available as a result of its contributions, these people are equivalent to sponsors.

Indeed, there is a case, cited in our statement on page 14, which so indicates. There, the Bowery Savings Bank of New York had underwritten some programs on channel 13. That bank, the court said, is a sponsor and the test as to its liability would be precisely the same as the test for liability of a sponsor in commercial television and that test is, "Did they exercise control over the program content?"

The court found in that case that there was not proof that the Bowery Savings Bank did exercise control and so it did not find them liable.

It is interesting that the kind of announcements now popular are precisely the same kind as you had in the early days of radio. WOR was the station in the famous *Bamberger* case. Before and after each program, a statement was made: "This is WOR, a service of L. Bam-

berger & Co., one of America's great stores." They argued that their performance was not for profit. The court held it was.

I think that, by a process of logic common to lawyers, you would find that a court today would say that what public broadcasters do is for profit.

As to the need for a synchronization license, Mr. Chairman, I think when you questioned Mr. Aleinikoff, you asked the one person in the world familiar with the subject who would have given you the answer that he did. Professor Nimmer is perfectly clear, and there is a case—*Foreign and Domestic Music* v. *Licht*—establishing a synchronization right as one of the rights granted by the 1909 copyright law.

One may not record music and other material in connection with a motion picture film, without a license. The public broadcasters know that. They were paying $50,000 a year until 1967 when we made a handshake deal that ASCAP would undertake to get these rights for them as part of an agreement that never came to fruition.

As a result of that handshake deal, they stopped asking for the right. For the past 8 years or so, they have simply been willful infringers.

We don't like to say that about public broadcasters because they are "good guys," but they have in fact been willful infringers and have been challenging the publishers to sue.

Mr. KASTENMEIER. One case involved a film which I don't think that public broadcasters would say they should pay for films. Would that make any difference?

Mr. KORMAN. The reason we mentioned that is on the question of whether there are sponsors or not, on the question of whether they are doing something for profit. The court there says that they—the Bowery Savings Bank—is a sponsor. The court pointed out that Bowery's "brief and rather sedate announcements" of its contributions is not so crass as announcements on commercial television, but is still "sponsorship." It is also something that they refer to in other advertisements.

They advertised in all the buses in New York City. They put up the money for the channel 13 programs in order to get goodwill. Mobil spends $800,000 a year just advertising in print and on commercial television that they underwrite programs on public television. That underwriting is a commercial activity. That is done for profit.

Mr. KASTENMEIER. Thank you, Mr. Korman. I regret having regressed to ask you these questions but to a very great extent the equities of the situation depend on the point from which the parties come. If the parties come from a point of liability to a point of liability, that is different than should they come from a point of no liability to a point of liability.

To the extent that what you have just said is relevant to that, it is very important.

Mr. KORMAN. I agree that is exactly the way I would state the problem. It depends on how you view the starting point. We think they are liable now under the present law. They insist they have no liability.

Mr. KASTENMEIER. Mr. Korman, you yielded to Mr. Cramer.

Mr. CRAMER. My name is Edward Cramer, president and chief executive of Broadcast Music, Inc. BMI represents over 30,000 Amer-

ican writers and 10,000 publishers located in every State as well as the works of tens of thousands of foreign writers and publishers.

BMI music is the most widely performed. Any oral presentation will be an abbreviated version of the statement already on file with the committee. My opposition to the Mathias amendment is simple. There is no need for it. I suggest that the threshold question is what problem is the proposed legislation designed to correct and the answer is none.

There have been no clearance problems. The proponents' position that we have heard this morning and that they have submitted in writing is that they might, and I underscore the word "might," have difficulties and they have to deal with us.

In school we used to call this the imaginary horribles. By the same reasoning, public broadcasting ought to be petitioning this body for special legislation to govern their relations with dramatists, landlords, equipment manufacturers and anyone else.

I suggest that we weigh these imaginary horribles against the factual record. BMI has been licensing users for 35 years. It has successfully concluded hundreds of thousands of licenses for hundreds of millions of dollars. Based on our record there is no reason to believe that our relationship with public broadcasters would be any different from any other users.

Why would we suddenly change our pattern of doing business just to create difficulties for the public broadcasters particularly where the amounts of money involved are comparatively modest? In any commercial structure, those stations that can afford to pay less, pay less.

I note also historically that some of the most successful shows used on public broadcasting, those broadcasts that produced awards, the Upstairs Downstairs, the World At War, the Monty Python Show, were produced without the benefit of any compulsory licensing and composers and publishers of music got paid.

The only ones who don't get paid are American publishers and writers. Representatives of public broadcasters have refused repeatedly to have meaningful discussions on this subject with us. For your consideration I have attached copies of letters addressed to Mr. Loomis, President of Public Broadcasting, in which I requested a meeting and to this day I have not had a reply. During the same period when I was unsuccessful in trying to talk with representatives of public broadcasting, I was able to meet with representatives of the Soviet Union in New York and Moscow and we were able to take steps towards the compensation of American music when it is played on stations in the Soviet Union, something we can't do here.

Most recently negotiations were held with public broadcasting under the auspices of a Senate subcommittee. These negotiations show that there are no problems with public broadcasters. The sole problem is reasonable payment for our writers and publishers.

Normally these negotiations might not be the subject for this subcommittee, but as it is the public broadcasters claim that they are unable to negotiate with us and therefore legislation is required.

A brief look at what went on can put the legislation in perspective. In essence, the public broadcasters made a proposal that all music suppliers receive a total of $300,000 a year for the first 2 years with small increases thereafter.

Specifically BMI and ASCAP would each receive $90,000 a year to begin with the use of the BMI repertory alone. This would come to less than $75 a station per day. That is why we could not come to an agreement.

It had nothing to do with any problems of mechanics.

I have explained why this proposal if accepted would cost American writers and publishers money, why they would have to continue their subsidization of public broadcasting, something which no other group is asked to do. I pointed out why the position could cost the United States millions of dollars that we receive from abroad.

That is all in the statement. The machinery set up by the Copyright Royalty Tribunal is not necessary and only further reduces the amount available to writers and publishers. It is obvious to me that what is needed is not more, but less legislation.

If the parties for any reason are unable to arrive at an understanding, the resort to legislation, a petition to this body is always available. I submit that there is no justification for legislation merely because of the unlikely possibility of future problems.

Before concluding my remarks I note that the subcommittee will also consider the Bayh amendment. We have submitted a paper on that and we join in the others on the table in opposing it for the record.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Cramer.

Now the Chair would like to call on Charles Lieb on behalf of the Association of American Publishers, Inc.

Mr. KARP. I will go first.

Mr. Chairman, my name is Irwin Karp and I appear for the Authors League of America. Accompanying me are Townsend Hoopes, Alexander Hoffman and Charles Lieb, appearing for the Association of American Publishers; Ivan Bender, appearing for the Educational Media Producers Council; and Jon Baumgarten, of the law firm of Linden and Deutsch, appearing for Harcourt Brace Jovanovich, Inc., and Macmillan, Inc.

Let me just try briefly to recapitulate what is in our rather lengthy statement and then I and my colleagues at the appropriate time would like to answer any questions you may have on the Mathias amendment. Public television programs today and for several years have on occasion used material from books.

Where that use exceeds fair use, licenses are required under the present law. Our statement, as does ASCAP, points out that the argument that a not-for-profit limitation applies is without basis.

In fact the only purpose of section 1(c) when it was drawn in 1909 was to allow the live reading of a book to a small audience in a lecture hall or an auditorium. No one conceived that that section would allow a noncompensated performance of a piece of music or a book broadcast over television or radio to an audience of hundreds or thousands or millions at the same time.

In morality it should have been changed long ago and they are not proceeding on that aspect. But clearly to the extent to which all public television and a large part of public radio in effect broadcast programs produced in one type of production center or another, they do require a license and they do require to the extent that they are taken out of not-for-profit exemption by their sponsoring activities.

In that connection, let me read to you from Newsweek magazine a brief comment on this.

"When radio was in its infancy, sponsors were granted only a brief, tasteful comment on each program they paid for." As Newsweek points out, many companies today are finding that public TV sponsorship may be more effective than conventional advertising.

It is also cheaper. Some noncommercial stations are working hard to promote the idea that sponsorship of their programs is more than charitable. Instead of rattling a tin cup, we are offering a quid pro quo, according to channel 13 in New York.

This is a professional operation funded by millions and millions of dollars a year in Federal funds and huge grants from foundations. They are receiving one-third of the $38 million spent around the country from grants.

In most instances authors and composers would voluntarily license and do grant them for the use of books, poetry, and other material at very modest fees. The people who produce the instructional programs will grant licenses to use children's books which are read in their entirety for as little as $25, $50, or $100.

In some cases the licenses are not needed. There are occasions when authors would decline to permit a reading because of serious economic or esthetic damage. The compulsory license system would deprive them of that right and of right to negotiate reasonable compensation.

There is no reason to inflict this costly complex and devastating system of compulsory licensing on composers of books. Licenses are obtained now voluntarily and can be obtained under voluntary arrangements. They as well as we, public broadcasters, would face a serious administrative burden under the section they have drafted.

It is their handiwork, and Barbara Ringer, the Register of Copyrights, in 1975 writes opposing the Mathias and Bayh amendments. She said, "Unless the parties negotiate all cases will have to be handled by the Royalty Tribunal.

"The burden on the Tribunal will be staggering, the administrative costs could well exceed the royalty assessed."

Then the Tribunal would have to parcel out the small royalty payments to different authors and publishers all over the country. Their burden in using the system would be equally onerous and the public broadcasters would have to file a report for every use they made in detail, much more detailed and cumbersome than the license agreement they use now.

At page 6 to page 8 of our statement, we outline the nature of public broadcasting, pointing out the heavy commercial sponsorship prevailing and the fact that a great mass of public television's programing is entertainment, cultural and informational programing, not classroom instruction, the same programing that is done on commercial television and achieving the same purposes for which authors write books and publishers publish them.

Large sums of money are spent on producing these programs. Millions of dollars are granted or obtained from corporate sponsors to produce a single series. It is not a shoestring amateur operation. Everybody in public television gets paid.

This is an industry run by professionals. All of their services are negotiated for on a voluntary basis. I wish we had more time and I will try briefly to glide over the serious damage done by compulsory license

systems. First of all there are occasions when an author would very logically decline to grant a license.

In those cases he is deprived of the right to protect his property. We discussed this at pages 11 and 12 of our statement. Compulsory licensing would deprive authors of compensation.

The objection of the proponents was stated by the public broadcasting system itself on a statement on the amendment in the Senate committee last year.

"Public broadcasting royalty payments must be held within low budgetary constrictions."

That is the reason they are pushing this amendment. As the Senate committee noted, public broadcasting stations may deserve greater financial assistance but they should not be subsidized by the country's creative talent. A royalty tribunal cannot establish fair compensation for literary works. There is a difference between the mass licenses of performance of music and the occasional performances of literary works. A tribunal could not take into account all the factors involved.

In many cases fees follow a person. There would be in most instances very low fees. But occasionally the work has tremendous value and occasionally the work is going to be used on one of those Polaroid specials or one of those heavily financed Xerox documentaries and there is no reason why an author should accept a low rate on a program like that.

He is entitled to negotiate for more. The cost factors involved in administering both the Tribunal and the Copyright Office will in turn diminish royalties to the point where they are nonexistent.

At pages 15 through 20 of our statement we have pointed out why compulsory licensing is not necessary. Right now public broadcasting lives with voluntary licensing for all of its program materials.

A great part of those materials are created by writers, directors in the employ of the station. Voluntary negotiations determine what they are paid for creating those programs.

A great deal of public television's program material consists of motion pctures, foreign television programs, and domestic programs all of which are negotiated for on a voluntary basis. I think my time is about to expire so I might as well stop at this point.

I do hope we can point out further in questioning why this whole fuss about the difficulty of clearance is sheer hypocrisy. There are not 29,000 hours of television programing on public broadcasting that use material from books. It may be as little as 1 percent of that material according to one of our colleagues on the television side in discussions with us.

Licensing consists of using a printed form. This type of licensing has been going on in American book publishing for the last 50 years. Most of the people who get the license are individual authors who are asking some other publisher for permission to use material. Without a lawyer, without a staff, with nothing but a 10 cent stamp and a piece of paper, they get the licenses.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Karp.

Mr. LIEB. We oppose with great vigor the amendment of the existing section 112(b) in H.R. 2223 and the substitution for it of the so-called Bayh amendment. Indeed, we go further and we suggest to you that the existing section 112(b) which permits the making of 30

copies and their use over a period of 7 years is too broad and that a better measure would have been the prior measure of 12 copies over a period of 5 years that was in your prior House bill and in the prior Senate bill.

Let me try to explain the Bayh amendment. I note this morning that it causes considerable confusion, and it causes me confusion at times, too. You have to read subsection 112(b), which is supplanted by the Bayh amendment, together with section 110(2). Section 110 is headed "Limitations on Exclusive Rights, Exemption of Certain Performances and Displays." The first subdivision exempts from copyright control the use of material in face-to-face teaching activities.

In subdivision (2), to which reference has been made in section 112 (b), this supplements the face-to-face classroom teaching provision with a further enlargement of the teaching right to broadcast instructional material provided the broadcast is a regular part of systematic instructional activities and the performance is directly related to the classroom study and the transmission is made primarily to the classroom or for disabled people who can't attend the classroom.

This is the subject of 112(b)(2), which provides that with respect to a transmission that may be made under the instructional broadcasting exemption of 110, the transmitting organization may make no more than 30 copies of the program for use over a period of 7 years except that a copy might be kept thereafter for archival purposes.

The Bayh amendment would eliminate all such restrictions. Specifically, what it would do would be to eliminate the 30-copy restriction, thus permitting the making of an unlimited number of copies. It would eliminate the requirement of the period of use, thus permitting the copies and copies of copies and so on to be used and reused over an indefinite period.

Moreover, it would permit the distribution of these records or audiovisual tapes or whatever you would want to call them, it would permit their distribution to an unlimited number of other nonprofit organizations and would eliminate the restriction that the distributees make use of these recordings subject to the systematic instructional requirements and limitations of section 110.

We think this is a gross and unfair and unwise statute. We think that the issue is not whether this kind of recording of instructional programs should be permitted. We think the issue is whether it should be permitted, programs which contain material copyrighted by others.

If the instructional organizations create their own programs and use their own work which they themselves might copyright or use works on which they get permission from the copyright owner then, of course, within that permission they would have the right to make recordings. Mr. Drinan asked this morning who opposes the amendments.

Besides the people at this table, your committee in 1967 opposed it, the Senate committee opposed it, Ms. Ringer, in her letter of January 31 of this year to Senator McClellan, said: "I am also unable to support the Bayh amendment."

The revision bill provides an exemption to make 30 copies. I feel that some limitation is necessary and 30 copies should be sufficient.

It is extremely difficult to insure that unauthorized copies are not made. We will be handing up copies of this letter.

[The letter referred to follows:]

COPYRIGHT OFFICE,
THE LIBRARY OF CONGRESS,
Washington, D.C., January 31, 1975.

Hon. JOHN L. MCCLELLAN,
U.S. Senate,
Committee on the Judiciary, Washington, D.C.

DEAR SENATOR MCCLELLAN: This is in reference to your letter of September 22, 1974 requesting the views of the Copyright Office on two amendments to the Copyright Revision Bill proposed separately by Senators Mathias and Bayh in the 93rd Congress, which you anticipate will be raised again during the consideration of S. 22.

Senator Mathias' proposal, identified as Senate Amendment No. 1815, would have created a compulsory license to use copyrighted nondramatic literary and musical works, sound recordings, and pictorial, graphic, and sculptural works in the transmission of educational television or radio programs on noncommercial educational broadcast stations.

Senator Bayh's proposal, identified as Senate Amendment No. 1831, would have granted an unlimited exemption to nonprofit organizations and governmental bodies to make copies of programs they transmit and to distribute the copies for transmission by other similar organizations. The revision bill as it passed the Senate and the pending bill, S. 22, permit such organizations to make 30 copies or phonorecords, subject to the limitation that all copies and phonorecords, with the exception of one for archival purposes, must be destroyed within seven years from the date the program was first transmitted to the public.

I am in full support of the objectives of public educational broadcasting, and I sympathize with the aims of the Mathias and Bayh proposals to facilitate these objectives. Nevertheless, despite the worthy motivations behind these proposals, I feel that they go much too far in creating new and additional exemptions to the legitimate rights of authors and copyright proprietors. The copyright system can fulfill its objective of promoting "the progress of science and the useful arts" only if the exclusive rights of authors to control use of their works and receive payment on a negotiated basis are respected. Reasonable exceptions to these exclusive rights are appropriate and necessary: the revision bill already grants many exceptions for nonprofit organizations and governmental bodies, and on some especially difficult, complex issues it has been necessary to resort to compulsory licensing systems. However, I am becoming increasingly concerned about the implications of widespread compulsory licensing of copyrights, and the dangers that these systems bring to bear on creativity and freedom of expression.

The revision bill provides significant exemptions with respect to performances and displays of certain copyrighted works on educational television for instructional purposes. The fair use provisions of section 107 would also permit limited use of excerpts on public broadcasting stations in general. The concessions regarding instructional television are especially significant. They meet the greatest need of educational television and permit broad access to certain copyrighted works on a basis comparable to educators in a classroom. These exemptions were carefully worked out as a reasonable compromise, and they have my general support.

On the other hand, a broad compulsory license to use certain works on open-circuit educational television such as that proposed by Senator Mathias, is not, in my opinion justified or necessary, and I urge the Judiciary Committee not to adopt it. In presenting non-instructional programs, educational television directly competes for viewers, with commercial television. Uncontrolled use of copyrighted works on educational television, even though subject to some payment as determined by the Copyright Royalty Tribunal, would seriously interfere with the markets for the author's works on commercial television, and would unquestionably decrease their value. Nondramatic literary works are particularly vulnerable since the author's market for performing them is so small. I realize that the budgets of public broadcasting stations are very small, and that the costs of obtaining clearances for small incidental uses of photographs, drawings, and the like can be unjustified, costly, and bothersome, but the broad-brush approach of the Mathias proposal seems unsuitable as a solution to this problem.

Addressing myself directly to the details of the proposal, I believe as a policy matter that the failure to establish any statutory royalty makes the plan unworkable. Unless the parties negotiate the payment, all cases would have to be handled by the Copyright Royalty Tribunal. The burden on the Tribunal

would be staggering. The administrative costs could well exceed the royalties assessed. In my opinion, it would be far more economical to increase the governmental subsidies to public television to pay for programming costs, including permissions.

I am also unable to support the Bayh Amendment. As outlined earlier, the revision bill provides an exemption to make 30 copies or phonorecords, for transmission. I feel that some limitation is essential, and 30 copies should be ample to facilitate the activities of nonprofit organizations. The circulation of as many as 30 copies itself presents some danger to creators, since it is extremely difficult to insure that unauthorized copies are not made. Moreover, I believe a limitation on the period the copies or phonorecords may be held is eminently sound. There is nothing magic about a seven-year cut but, as a matter of principle, if a program is to be rebroadcast after a substantial period following the initial transmission, the authors and proprietors of the copyrighted works embodied in the program should be entitled to renegotiate a new deal, including additional compensation.

In conclusion, I must oppose the broad exemptions from the rights of authors proposed in the Mathias and Bayh amendments. The laudable objectives of public television and radio can be achieved more appropriately, and probably more economically, by direct support through government funding of public broadcasting. Direct subsidies represent recognition of the often-stated but fundamental truth, that creators of copyrighted works are entitled to just rewards from society for their endeavors as surely as administrators, technicians, performers, and other workers engaged in public broadcasting.

Sincerely yours,

BARBARA RINGER,
Register of Copyrights.

Mr. DRINAN. Would the gentleman yield for just a moment? I asked that question because I thought that all of you people had amicably worked out all your differences. In this Senate subcommittee where everybody gets along so well, they must have a charm over there.

Mr. LIEB. I should say that our conversations, which we held at the suggestion of the Senate subcommittee, related almost entirely to the Mathias amendment. There were no discussions about this and we had assumed prior to July 2 when we were told by the public broadcasting people that they would not negotiate further with us on an agreement in substitution for Mathias, we only learned after that that they would push for the Bayh amendment as well as the Mathias amendment.

I also want to call your attention to the fact that the Cambridge Research Institute which published the survey of the copyright law for your general assistance in 1973 expresses the opinion that the elimination of the limitations in section 112(b) are unnecessary.

Mr. KASTENMEIER. Thank you, Mr. Lieb.

Mr. KORMAN. Could I recapture 10 seconds of the several minutes? Our statement was rather lengthy and I fear that no one would get to look at the exhibits attached to it. I would like to call the committee's attention to the last exhibit which consists of copies of four letters that NET sent to a music publisher at a time when it was still acquiring synchronization licenses.

I am troubled, Mr. Chairman, because in 1975, my friend, Eric Smith, this morning speaks of the great difficulties of establishing clearance practices. There are simply no such difficulties. I call your attention to this because these letters illustrate how easy it was. On the third page of the first of them, there is a note which I think is particularly interesting.

This is a letter dated March 8, 1965, from NET to the Associated Music Publishers Co. In the letter, they are requesting a synchronization license for NET programs and they don't even identify the compositions.

They say in the note selections 2 and 3 above are as yet unnamed. Mr. Cowell will select them at time of performance. We will let you know at that time. However, overall duration will remain 8 minutes. What does it mean? It is an illustration, Mr. Chairman, of how this business really works.

Clearances are often obtained long after the fact. Commercial television network series may run the full 39 weeks and be off the air before the lawyers have gotten the contracts in shape to be signed. No one is sitting around lurking, as these public television people would suggest, behind bushes with clubs to hit them over the head as soon as their foot slips.

It does not happen at all. They can readily get the permission they need.

Mr. Kastenmeier. I appreciate your referring to these letters.

Mr. Lieb. May I request permission for Mr. Bender to submit a statement and possibly to say a few words?

Mr. Kastenmeier. We would be pleased to accept your statement. What do you propose to speak on?

TESTIMONY OF IVAN R. BENDER, ON BEHALF OF THE EDUCATIONAL MEDIA PRODUCERS COUNCIL, AND JON BAUMGARTEN ON BEHALF OF MACMILLAN INC. AND HARCOURT BRACE JOVANOVICH (PUBLISHERS)

Mr. Bender. I would like to amplify a statement that was made by Mr. Cohen this morning representing the agency for instructional television. I would like to also ask your permission for us to file a short written statement to further amplify and illustrate what I am going to say.

Mr. Kastenmeier. Without objection we will receive that statement as I noted earlier. You are recognized for 2 minutes.

Mr. Bender. Mr. Cohen seemed to represent this message that there is no such thing as an educational audiovisual industry. As a matter of fact, that is not true and I am sure that you realize that several hundreds of educational films and filmstrips are produced every year in this country and the use of those films is designed for schools and other kinds of instructional purposes.

The fact of the matter is as well as the use of these materials in the schools, the new technology, closed circuit television and open circuit television has caused our industry to look into this particular phase of the marketplace much more readily and in fact depend upon it very, very much.

The distribution of 60 millimeter motion pictures in the schools is becoming a much more difficult prospect because of the new technology. If the Mathias and the Bayh amendments together were adopted, the recording and distribution and retransmission privileges under the Bayh amendment, I say would put the television people in a tremendously unfair competitive situation where they would not only have an additional subsidy to create the materials but also be able to distribute those materials for retransmission without the kinds of problems and constraints that the commercial sector does have.

Lastly, I would like to say that many educational television stations actually seek distributors, commercial distributors of their materials.

As a matter of fact in Northern Virginia, the Northern Virginia Educational Television Authority recently contracted with the Encyclopaedia Britannica to produce television shows. They sought permission to use the materials that appear in those programs and were able to grant to us the rights to distribute those materials in the schools.

That is the end of my statement today and I would like to file this further written statement. Thank you very much.

Mr. KASTENMEIER. Someone mentioned from the questions that we ask you are not to infer positions. Whether or not we necessarily agree with the thrust of the questions we ask, however, sometimes emotions of the questioner betray whether or not the question is put in that fashion.

We were developing the question of whether much of what public broadcasting presents now or whether public broadcasting is a not-for-profit enterprise for purposes of copyright. You cited a case or two. We have not been able, of course, to expand fully on it because it would take a very long time. But is it not the case that some public broadcasting or some public broadcasting facilities are not for profit and some public broadcasting facilities, because of perhaps the way they present their material or for other reasons are for profit?

Is that not the case? Can you not find a pure not-for-profit broadcasting enterprise?

Mr. KORMAN. If there were a public station that did not have any corporate announcement of financing, no sponsorship in any sense, and if anyone were paid at that station for rendering services, if they got the musicians to come in and perform free, I suppose everyone would agree, if no one got paid and the executives also contributed their services, I don't think any argument could be made that there is any profit for anyone.

There a situation did arise years ago that I think is pertinent to the question you raise. There was a radio station, and this case is referred to in our statement, there was a radio station operated by the Eugene Debs Memorial Fund qualified as a nonprofit educational foundation. That station broadcast a copyrighted composition on a sustaining program, a program that had no announcements.

The question was whether that performance was a public performance for profit. The court held that it was. Its reasoning was that that performance and that program was used to attract an audience and the station did have other programs which were commercially sponsored. Even though the ultimate purpose of the foundation was charitable, the fact that this money was brought in resulted in the foundation not running at a deficit was considered to make it for profit.

The music was used in a way to produce money for the foundation and the court felt that the copyright owner was entitled to be paid. If people are making their living as people in public television industry, and I deliberately call them an industry.

They are. They are big. If everyone else is making money out of this industry, then it seems to me that the people who furnish the creative materials that go into the programs should be compensated.

Mr. KARP. May I supplement that by pointing out that we in New York and across the country have long since recognized that the distinction between profit and not for profit often is meaningless.

The Port of New York Authority is not for profit. Read the book "The Power Broker" and you can't help realizing there has been a

tremendous revolution. There are many organizations run in this country which qualify as not for profit.

Public broadcasting is big business, heavily financed and should not be rattling the tin cup. I said we are not rattling the tin cup. We have got something to sell.

Mr. KASTENMEIER. I observe that the authors of these amendments concede that payments ought to be made.

Mr. KARP. But under a system badly conceived in a way that every nickel paid in royalties——

Mr. KASTENMEIER. I don't recall they mentioned any figure.

Mr. KARP. The point is their statement suggests it is necessary to keep these fees as low as possible. I think that this system is designed to do this and if you are going to have a dual administrative proceeding, first rate fixing and then fee distribution, for the copyright office with the bill saying this, the costs of the fee distribution shall be deducted from the royalties, there is going to be nothing left for the creators.

Mr. KORMAN. Your question was whether the performances were for profit now.

I think that the performance on most major public television stations today are all for profit on the theory that the entertainment programs in the evening are certainly for profit. They are underwritten. They have sponsors. In the same sense that early radio stations had sponsors. If corporations are using that medium for the purpose of selling the companies, not the products, but the companies, then every part of the operation is commercial.

Therefore, the performances are all for profit. These corporations are trying to address audiences and everything that these stations do is designed to attract audiences to watch these channels rather than other channels, or rather than doing something else.

Mr. KASTENMEIER. For the profit of whom?

Mr. KORMAN. In the case of corporations which furnish the money, for the profit of the stockholders of those corporations. With respect to the educational programs, the people who produce those programs, the Children's Television Workshop, those people are making money.

Mr. KASTENMEIER. I don't know that. I for one cannot answer whether they are not for profit within the meaning of the terms used in the existing law. We can study that and make some determination.

I have a second question, whether coming from—if indeed they come from an exempt status to a point where they are included fully, there is an analogy, of course and I say this because you have indicated in your statement that ASCAP is opposed in principle to any form of statutory compulsory license, that the jukebox people come from a similar exempt status to coverage under the proposal and they indeed do have compulsory license and have asked what I suppose the proponents here would ask. There are certain differences and I appreciate and feel that the proponents here are not really—do not come from a clearly exempt status. But if they were, it would be analagous in fact that in principle you have already agreed to the statutory license for jukebox operators.

Mr. KORMAN. That has a long and sad history, Mr. Chairman. I think our position on the jukebox provision is that in 1967 we were faced with a kind of a take-it or leave-it situation. We were advised, "If you want any bill you better go along with the $8 fee because the

jukebox people have power in Congress." We took the $8. We feel if we want a bill, we better not open that can of worms.

But now, Mr. Chairman, when you say to me that the public television people ought to be treated the same way as the jukebox operators you are putting a very difficult question to me. Are you also saying to me or would you say to me, Mr. Chairman, Mr. Korman, if your clients want a bill, you better be awfully careful about what you do with the public broadcasters?

Mr. KASTENMEIER. The history is, of course, long before the $8 was agreed compulsory license was agreed upon.

Mr. KARP. We should note for the record that neither jukebox nor cable television offer any precedent at all. The jukebox never permitted the jukebox player to play a recording of a book. It does not permit the proprietor of a jukebox to produce a recording of a book or a piece of music.

It does not permit them to do what the essence of public television is, which is to produce recorded programing which is like a motion picture studio.

Cable television was limited to the function of antenna retransmission. That is the only time a cable system has any right to do anything without permission. A cable television producer can't buy a recording and broadcast it. The only thing a cable system can do is retransmit off the air to its subscribers because it is serving as an antenna and nothing more.

Mr. KASTENMEIER. That is a limitation of some cable systems but not others.

Mr. KARP. They can't create programing without permission.

Mr. KASTENMEIER. What we are confronted with in the future is something else.

Mr. KORMAN. We should look to the precedent of the symphony orchestra. They are kept going by private donations. They don't operate for profit in the ordinary sense, but they have always taken licenses. They have always recognized their responsibility to composers to see to it that they got paid when their music was being performed.

The symphony orchestra associations are like the public broadcasters except that the public broadcasters choose to assimilate themselves to the jukebox operators rather than the symphonies. I wonder why particularly when public radio says "Classical music will die unless we get a free ride." There is an association called the Concert Music Broadcasting Association. It is going very well. WNCN in New York, a concert music station, was sold to Senator Buckley's brother's company and it became a "rock and roll" station. There was an uproar. The public wants that station back as a classical music station and they are going to get it back.

[Subsequent to the hearing the following correspondence was received for the record:]

AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS,
New York, N.Y., July 11, 1975.

Hon. ROBERT W. KASTENMEIER,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: At the hearing yesterday, one of the spokesmen for the public broadcasters suggested that, unless the Mathias Amendment were adopted, classical music could not be broadcast by public radio stations if H.R. 2223 were enacted.

In pointing out that there is no such danger I referred to the fact that no one needs any license to perform Mozart, Bach or any other classical composer whose works are in the public domain, and stated that the works of modern serious composers are freely (if not gratuitously) available under ASCAP, BMI or SESAC licenses to precisely the same extent as are the works of popular composers. They are all included in a single license granting access to an entire repertory.

A question was also raised about the economic health of stations whose program formats emphasize serious music. I pointed out that there is an association of such stations—the Concert Music Broadcasters Association—and that they seem to be in fairly good economic health. I referred to the battle to return WNCN to a classical music format.

This morning's Wall Street Journal contains a story about WNCN, a copy of which is enclosed. One expert and filer of a competing application for WNCN states (in the fifth paragraph from the end of the article) that ". . . . WNCN can be operated profitably, as classical stations in other cities are."

The one way to cut into the profit of these stations—and some of them are less healthy economically than others—would be to permit the growing number of public radio stations to perform serious music without paying any copyright fees. That's the surest way to do in today's serious music stations.

It is interesting to note that GAF's motive for buying WNCN, for a hefty price of $2.2 million, is because the company is "looking for an opportunity to do good and to do it at a profit." This is the same opportunity, we say, that underwriters of programs on public television seek—although their profit may be less direct.

I appreciate the courtesy extended by you and your Committee.

Respectfully,

Enclosure.

BERNARD KORMAN,
General Counsel.

[From the Wall Street Journal, July 11, 1975]

BACK TO BACH—CLASSICAL MUSIC LIKELY TO RETURN TO FM STATION IN NEW YORK, THANKS TO LOYAL LISTENERS' FIGHT

(By Michael J. Connor)

NEW YORK—Jess Brodnax remembers too well the morning of last Nov. 7. Radio station WNCN was solemnly broadcasting Mozart's "Requiem." "It was right at the part where they sing 'May light perpetually shine upon thee,' " listener Brodnax recalls, when Mozart was suddenly interrupted by a rock 'n' roll rendition of Chuck Berry's "Roll Over Beethoven."

The attempt at humor was Starr Broadcasting Group, Inc.'s way of telling listeners that WNCN, a classical-music institution in this city since 1957, was at that moment switching its format to progressive rock and its call letters to WQIV. While lovers of Beethoven and Bach had been expecting (and lamenting) the switch for some weeks, Mr. Brodnax says, the joke at the composers' expense "offended and outraged" many of them.

Almost eight months have passed since the station switched to rock 'n' roll—and now it appears that Mr. Brodnax and other classical-music buffs in this city are going to get the last laugh. Since last year, they have waged an intensive legal battle and organized a listener protest that has, at times, resembled a holy war. Largely because of that effort, one thing appears certain: WNCN's classical-music format will be returning very soon.

Citizen-group challenges to broadcasters aren't unusual—more than 200 are pending before the Federal Communications Commission—but the WNCN case illustrates how a group of determined citizens, by applying sufficient pressure, can get just about what it wants in a short period of time. In recent years, similar battles involving threatened classical-music formats have also been waged—successfully—by listener groups in Atlanta, Syracuse and Chicago. The key to what seems like victory in New York, says Kris Glenn, an attorney representing one listener group, is that "Starr thought we were going to go away—but we didn't."

"A Political Movement"

Indeed, what started out last year as a helter-skelter attempt to save a favorite radio format has developed into what one attorney calls "a political movement," staffed entirely by volunteers—but backed by a relatively large

and influential public. The FCC, for example, has received more than 4,000 letters from WNCN listeners (ranging from musicologists to longshoremen) and petitions bearing more than 105,000 signatures. The WNCN cause has also been championed by the governors of three states, the New Jersey state legislature, the New York City Council, more than two dozen members of Congress and a host of influential citizens. What little financing there is for the operation has come from contributions and fund-raising events, including a major concert featuring folk singer Judy Collins and various classical artists.

All the time, emotions have run high.

"For sheer beauty and selection of classical music—and the fact that it was 24-hour-a-day classical music—WNCN was incomparable," says Eve Klein, a retired secretary from the Bronx who has garnered several thousand signatures on petitions to the FCC. Mrs. Klein, a frequent attender of cultural events, says she buttonholed people in theater and concert-hall lobbies and "even used to go to the ladies' room and get the ladies waiting in line to sign." One less-confident man, distraught at the loss of WNCN, broke into tears at a street demonstration, started drinking, and had to be helped home.

But the efforts have apparently paid off, putting the listeners in control of a complicated situation involving negotiations among five teams of lawyers in two cities. Starr Broadcasting, aching from legal and other expenses, announced last month that it wants to sell WQIV to GAF Corp., a diversified manufacturer of chemicals and other products, for $2.2 million. GAF wants to buy the station and return it to classical music, a spokesman says, because the company is "looking for an opportunity to do good and, do it at a profit."

Starr, on the other hand, is reluctantly selling the station. The decision came after Starr's position had worsened in May when an organization called Concert Radio and allied with the two listener groups in a "competing application" with the Fox. The organization asked that it be allowed to run the station rather than Starr—a move that complicated Starr's position.

So Starr decided to give up. The listed groups "filed so much and raised so many questions that it became too time-consuming and too costly for the company to push this to its resolution," says an unhappy Michael Starr, executive vice president of the company. "We were never less than optimistic about winning, but we simply can't afford the time and energy anymore."

There is a problem, however, to the sale to GAF. It can't be completed until there is a withdrawal of challenges by two listening groups and Concert Radio. And the groups say they won't withdraw unless they do certain things. Thus far, it's understood, their demands include a guaranteed return to the continuation of classical music, a listening voice in the station's future management, reimbursement of legal expenses and the Concert Radio—an option to buy the station if GAF ever wants to sell it or change the format from classical music. The primary purpose of the listener demands, says Charles Firestone, an attorney with the Washington-based Citizens Communication Center, is "to make sure the same thing doesn't happen again."

Livid Listeners

Despite this sticking point, lawyers who have been negotiating for weeks are said to be on the verge of an agreement that will, one way or another, bring WNCN's format back to New York. (In fact, there are rumors that the station, which has had trouble making money because of its uncertain status, will return to the classical format even before the sale to GAF is completed.) Although the sale could still fall through for a variety of reasons, one negotiator says, "The biggest problem now is having all of us stay civil until this thing is over."

Civility hasn't been the dominant virtue in the WNCN case since it started last August. That was when Starr announced that the station would switch to popular music after 17 years with a classical format. Starr, which bought the FM stations in 1972 for $3 million, had originally told the FCC that it intended to retain classical music. But after a two-year attempt, the company said, it was clear that competition from other local stations playing some classical music made ever-increasing losses likely. (The main competition came from the New York Times Co.'s WQXR–AM and FM, which play mostly classical music.)

Listeners were outraged. Even Starr's chairman, conservative commentator William F. Buckley, himself a WNCN listener, declared that he had "no intention of listening to it under the new format." Mr. Buckley personally championed a unique campaign to "Save WNCN." The plan was to raise $500,000 from the public and donate it to a local noncommercial radio station together with

WNCN's classical-record library. The theory was that the noncommercial station, working with the $500,000 subsidy, would re-create WNCN's format while Starr's WQIV played the Rolling Stones.

The $500,000 was pledged within 10 days. But when it became clear that no noncommercial station could or would take over WNCN's format, listener relations with Starr and Mr. Buckley soured to the point of animosity. For instance, Alan Rich, music critic for New York Magazine, claimed that Starr had lied to the public and the FCC. He charged that Mr. Buckley's "Save WNCN" campaign was a public-relations ploy and a "tawdry insult to the intelligence."

Volunteer staffers who had been helping Mr. Buckley changed their loyalties and began aiding the two listener groups—the WNCN Listeners' Guild and Classical Radio for Connecticut.

The legal front

On the legal front, meanwhile, things were getting complicated. Lawyers such as Kris Glenn and Charles Firestone had begun filing hundreds of pages of motions and pleadings with the FCC and the courts. Their basic aim, however, was simple: that Starr's license either be revoked or not be renewed. Their case was bolstered by an October ruling by a federal appeals court in a Chicago case; WEFM in that city had attempted to switch to pop music from classical.

The court ruled that when a "unique" format is involved, the FCC must consider the "public interest" in determining whether a license can be transferred or renewed. The ruling, which places the FCC in a position of evaluating programming, may be appealed to the Supreme Court.

The listener-group petitions, however, also contain a barrage of serious allegations about Starr and the company's top executives. For example, it was charged that Starr bought WNCN with the intention of turning it into a rock station. It was further alleged that Starr thus intentionally let WNCN "run down" into a severe money-losing situation to justify the switch to a more profitable rock format. And it was charged that Mr. Buckley's "Save WNCN" campaign was an attempt to "willfully mislead" the listeners and draw their energies away from other efforts to save the station.

Then in May came the "competing application" from Concert Radio. Headed by wealthy Chicagoan Charles Benton, the company was formed to compete for WNCN's license and is allied with the two listener groups. (For instance, Mr. Brodnax, the listener who objected to the playing of "Roll Over Beethoven," is a director of Concert Radio.) Mr. Benton says WNCN can be operated profitably, as classical stations in other cities are. But he says a major goal of the company is simply restoring the WNCN classical format to New York City.

The filing of the competitive application was an important strategic development in the legal maneuverings, most observers agree. The FCC could have scheduled a hearing to consider the merits of Concert Radio's application and of Starr's defense. (This is still possible but because of the pending sale now seems unlikely.) A negative finding about Starr's "character" by the FCC would have forced Starr to surrender its New York license without any compensation and also could have jeopardized Starr's hold on another 10 radio and television licenses.

A hearing, moreover, takes several months and a lot of money. Starr's legal expenses, which have already exceeded $100,000, could easily have risen to $500,000 had a hearing been held.

Starr says it would have won out in a hearing, but it nonetheless is giving up. It denies all listener allegations. Peter Starr, president of the company, says: "There's no question that we tried to make money with WNCN, and there's no question that we were losing money. This case raises questions about the future of radio. Is it going to be allowed to change with American life-styles? Or will people be able to insist that stations remain in a particular format?"

Whatever the answers may be to those questions, Starr's WQIV now is a lame-duck station. It is expensive to operate and, because of its status, it has trouble selling advertising. Meanwhile, GAF Corp. and Starr are trying to wrap up agreements with the various parties, all of which must be approved by the FCC. One irony is that now the FCC may never consider the allegations made by the listeners against Starr. And another, noted by the WNCN Listeners' Guild, is that WNCN, with the aid of all the publicity surrounding its demise, may now be able to attract enough listeners and advertisers to make its resurrection profitable.

Mr. KASTENMEIER. I understand. I think music is somewhat different. I was going to ask Mr. Karp, one of my problems is to see how

public television as the giant you describe and increasingly affecting all the transmitting of commercial television, how, for nondramatic literary works, what use it puts those dramatic works to.

If you make the argument—and there are two arguments—one can make the arguments that the author ought to have the right to control whether or not his work is used and that is a reasonable assumption on the part of the artist. Apart from that, there is also a question of whether he is damaged by the use of his works.

How could an author be damaged?

Mr. KARP. Well, we——

Mr. KASTENMEIER. Some of the programs you mentioned, Buckley's "Firing Line" and one or two others don't really appear to involve copyrighted material. "Book Beat" might.

Mr. KARP. I didn't mention those as examples of programs that use literary materials. I mentioned them as examples of public broadcasting programs as distinguished from the instructional. Anybody who watches prime time evening public television would wonder what these people are doing here claiming that they are in this dire need for literary materials. I mentioned them as examples of public broadcast-

They claim that some of the local programing requires it. Our point is that where it is required, licenses can be granted easily and licenses are granted, for example, by the authors of children's books.

One of the principal creators of the material that is used on various types of programs, some instructional and some noninstructional where the book is read at considerable length. I have here, for example, the 1974–75 educational television guide from New Jersey, one State. They have a bunch of bigger ones. I only brought the small one. There are dozens of programs listed which start with a description, for example, the first is a children's book published by Norton Publishing Co. and then the books are read in this program.

There are various types of uses that can be made. How the author can be hurt if it is used without his consent? First of all there are occasions where even the reading of an entire work may interfere with the licensing to a broadcaster or a motion picture company who may not like the idea of unlimited—and that must be stressed—to make recordings and use them forever. That can be very damaging to those commercial users. Another way it can hurt is if the author has an opportunity to sell a recording right on his book or a tape and more books are being put on commercial records and tapes.

If that kind of a book could be taken under a compulsory license, turned into a recording, which is what they are really in the business of doing and then broadcast and rebroadcast, he would lose that commercial right. Then there is also the fact that on certain types of books, the readings of the book at any length can hurt sales of the book itself.

If you read a short mystery novel to a radio audience and you are reading them right down through including the solution, who is going to go out and buy the book? The other aspect of the hurt question is that there are times when the author of a particular type of book feels that the reading of it by a particular producer, in a particular manner, could be damaging to the work itself.

There are even certain types of literary works that don't really go well when they are read vocally. A lot of people are under the as-

sumption that you can take any book and you can read it and that it sounds just as good read as written.

That is not so. That is why when a book is sold for radio or television, it has to be adapted. But on top of all that, compulsory licensing system does the other terrible economic damage of constituting a tribunal's determination of mass rates which are definitely going to reach the lowest common denominator and tells the author we have taken your property, shouldered the cost which we are going to have to pay for, and now we are going to distribute it and that cost is going to come out of your royalties, too.

Mr. KASTENMEIER. I can understand why an author might be entitled to control of his materials and why he might want some additional compensation. I guess I am persuaded that the broadcasting of a part or a whole would likely damage, commercially damage the author by public or educational broadcasting. But that is a different question.

Mr. PATTISON. What about the compensation after the performance has already appeared?

Mr. KORMAN. What happens in this industry is that people get certain standard amounts as the amounts that are paid as fees. For example, in network television, commercial network television, it is understood, although there is no piece of paper on this—there used to be until 1966, but not since then—it is understood that the networks have a right to synchronize music in connection with their programs for use in a single television network show.

If they want to do a rerun, the publisher will ask for and receive $25 or $50. The particular publisher has established what he wants and everybody knows what it is. They know they can do it and what it will cost.

Mr. PATTISON. As a practical matter, it does work.

Mr. FEIST. If I might add just two points, these relationships are continuing relationships. They rarely would be one isolated license to one producer. These are business relationships which go along for a period of years. Like all business relationships, there are accommodations and goodwill.

Mr. PATTISON. The problem of classical music, you mentioned an organization that the ASCAP, BMI, SESAC——

Mr. KORMAN. No. The Concert Music Broadcasters Association is a group of radio stations that specialize in what you refer to as classical music. There is no question about playing that. You don't need anyone's permission to perform it.

Mr. PATTISON. What about recording it?

Mr. KORMAN. Even for recordings.

Mr. PATTISON. If I record it and you want to use the record.

Mr. KORMAN. If a public broadcasting radio station or anybody wants to perform the RCA or Columbia recording of Mozart by the Philadelphia Orchestra, they buy the record and they play it over the station. They don't pay anybody any more than the price of the record. If their listening audience gives them the record, they don't even have to pay for the record.

Mr. PATTISON. One of the problems with serious music is not in the case of public domain music but newer authors.

Mr. KORMAN. Take Aaron Copland or any of the other serious composers, their works are available to precisely the same extent as are popular works. If someone has a license he does perform anything in the repertory.

Mr. PATTISON. Suppose he does not have a license but he would like to perform on a one-time basis?

Mr. KORMAN. He can call Mr. Copland and Mr. Copland would probably say I would be happy to have you do it. Actually under our consent decree, ASCAP is forbidden to issue a license for a single specific work. We can call Mr. Copland and put him in touch with the user, unless he and the user ask us to issue a license.

Mr. PATTISON. SESAC can issue a license for a specific work in its repertory.

Mr. CRAMER. The amount that the commercial stations pay depends on their revenue. If the stations are running low, they pay very little. Some of the concert stations that use the BMI repertory of music pay a minimal fee of about $300 a year so that that fee is not a deterrent to the programing of music.

That is what we are talking about.

Mr. KORMAN. In addition, WKCR is an FM station in New York, broadcasting to the entire New York market. We have always given them a free license. I think BMI and SESAC probably have too. They are classical music and are heard by anyone who has an FM receiver in New York City.

Mr. KASTENMEIER. Under present law, why do they require a license?

Mr. KORMAN. I guess we may be giving them ice in the winter because they don't have any commercials and they don't pay anybody because it is a student-run operation of Columbia University. They are concerned and they ask and we say, "Sure."

Mr. PATTISON. Mr. Karp, I don't understand—I understand the problem with music but the same kind of mechanism does not exist with literary works. Why hasn't that same kind of thing grown up in literary works? Is it likely to?

Mr. KARP. I think there are two basic reasons. I don't think the Department of Justice would smile if we all got together and said we are going to pool all the literary works in the country and fix the price for them collectively in negotiation with users and you can license anything you want.

Mr. PATTISON. The music people have the same antitrust problem.

Mr. KARP. They have solved their antitrust problem by getting themselves a consent order after being sued for violating the antitrust laws.

There are tremendous differences between licensing music and literary work. Music has a continuing life. I have heard the same performance of Irving Berlin's "All Alone by the Telephone" 100 times.

I can think of other songs but that is a good one. Each time it is played there is an audience for it and it can be the same people listening over and over. How many times will I read the same book?

Just once. That exhausts it. In music, the performer who writes a viable work will be compensated pretty much in proportion to its value

because he is paid on the basis of number of performances. That is how the fees are distributed by ASCAP, basically on how many times the work is used.

Mr. PATTISON. I would have thought perhaps a clearance system without price fixing——

Mr. KARP. Yes. What we have said to public broadcasting is we know that voluntary licensing works because authors and publishers have done it thousands of times over the last 50 years.

If an author is writing a textbook and he wants to quote 20 pages from another author's book, he sends him a piece of paper and he gets it. We pointed out to them that one of the reasons for delay is that people are not accustomed in public broadcasting to applying for this.

We get publishers getting requests to use a work and the requester forgets to name the title of a book. You have to write a book. We negotiated with public broadcasters a recommended form of license. We went through three drafts with them and I think they agree in substance with us, in fact they told us we are close to agreement.

That license would have eliminated a lot of the delay. The Association of American Publishers offered to set up a form of clearinghouse, an expediting center which would without fixing prices take care of these minor administrative problems.

They look with favor on that. Then they came back to us and raised five open questions which in effect said, but you can't guarantee that every author will give every license, you can't fix a price and you can't make it perpetual, and, of course, we can't do that.

Licensing and book publishing works very simply. What we would propose to them would solve the minor problems they may have now for the comparatively small uses they make of literary material.

The fact is that they do, various television production centers have even gotten up their own forms and use them with publishers and agents right now.

Mr. KORMAN. I would like to emphasize, if I may, Mr. Chairman, that this last point that Mr. Karp makes is one the subcommittee should focus on.

This problem is a music problem. It is not a book problem at all. The amount of nondramatic literary material that is used is infinitesimal in public television and I don't think it is very much greater than that in public radio.

Music is the problem. They say where there were many musical compositions that they had to perform and they could not deal with all of the widespread music publishers and composers. That is how this whole thing started.

The fact is they never had a problem in music. There are three performing right licensing organizations. There is a Harry Fox agency. Everyone else in the world is able to deal with these four organizations separately. The public broadcasters, among other demands, which make negotiations very difficult, say "We want to deal only once with all four of you," and they thereby create antitrust problems.

Why don't they deal with us separately? Everyone else does.

Mr. KASTENMEIER. The gentleman from New York.

Mr. PATTISON. No further questions.

Mr. KASTENMEIER. We appreciate the contributions you collectively have made today and I expect some of you will be appearing before the subcommittee on similar issues in the future.

Until July 17 at 10 a.m., in this room, 2226, the subcommittee stands adjourned.

[Whereupon, at 1:15 p.m. the subcommittee adjourned, to reconvene at 10 a.m., July 17, 1975.]

COPYRIGHT LAW REVISION

THURSDAY, JULY 17, 1975

House of Representatives,
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
of the Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:20 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Pattison, Railsback, and Wiggins.

Also present: Herbert Fuchs, counsel, and Thomas E. Mooney, associate counsel.

Mr. Kastenmeier. The hearing will come to order to hear testimony on H.R. 2223 and other measures relating to the revision of the copyright law.

The Chair observes that the House is in session and we may from time to time have to recess for votes and may not be able to maintain a full complement of the panel.

We will try to adhere to time limits. I realize it is difficult sometimes for witnesses to confine their remarks to a short period of time such as 5 minutes, but in order for the committee to cover the ground necessary, we will ask your indulgence, mindful that other points you may make or should have made can very often be covered in colloquy following your formal presentation, and mindful as well that your full statement, if you have one, is available to the committee and for the permanent record.

This morning the Chair would like to call first, with respect to the title II of H.R. 2223, that is, the title relating to design protection upon an individual who has made an enormous contribution in that field alone, as well as to others in areas of the law, a well, a very well-known person, Alan Latman. I will ask Mr. Latman to come forward. He has been before this forum on other occasions, and the subcommittee is very pleased to greet him again.

TESTIMONY OF ALAN LATMAN, COPYRIGHT ATTORNEY

Mr. Latman. Thank you very much, Mr. Chairman.

Mr. Chairman, Mr. Railsback, and members of the subcommittee, my name is Alan Latman and I am a member of the law firm of Cowan, Liebowitz & Latman in New York City. I am also an adjunct professor of law at New York University School of Law, and I am privileged to testify on the Design Protection Act or the design bill as it has been known, title II of H.R. 2223.

I am testifying in an individual capacity on this subject, although as graciously adverted to by the chairman, I have served as the counsel to the National Committee for Effective Design Legislation, a group I will mention in a moment, and I am also counsel to two organizations which are also appearing here on a slightly different subject this morning. That is, the International Typographic Composition Association and the Advertising Typographers Association.

One thing is indisputable about title II and that is its venerability. It is even older than title I, which sometimes seems like a hard task to achieve. It first saw the light of day in 1957 when Chairman Willis of this subcommittee introduced the bill at the request of the coordinating committee of the National Council of Patent Law Associations. The Chairman of the coordinating committee was Giles Rich, who is presently a judge of the U.S. Court of Customs and Patent Appeals. Judge Rich presided over an eminent drafting committee consisting of acknowledged leaders of the patent bar and was enormously assisted by some well-known and talented advisers from the Patent Office such as Pat Federico, and from the Copyright Office such as George Cary and the present Registrar, Barbara Ringer.

The Willis bill of 1957 as drafted by this group then went through a rather extensive period of refinement. The refinement process was done through a group called the National Committee for Effective Design Legislation. This group was operating from 1958 for about a decade and its job was to receive the recommendations of industry and the bar and try to answer problems and suggestions that came up through those years, and as I indicated, I served as counsel for this national committee through its years of operation.

In the Halls of Congress the developments were extensive. The Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights held three separate sets of hearings through the 1960's and indeed the Senate passed the bill on three occasions. The bill was consistently supported by the Patent Office and the Copyright Office, both of whom I gather have issued statements of support already to the subcommittee. I believe the Copyright Office letter that I saw of yesterday makes reference to the need for this and the statement of Assistant Commissioner Tegtmeyer indicated support. The Justice Department always consistently opposed the bill in almost precise language of a statement that I have seen submitted to this subcommittee. The Senate nevertheless passed the bill on three occasions.

The House consideration was focused in the 88th Congress when this subcommittee held a 1-day, I believe, hearing in 1963. The subcommittee reported the bill without amendments in August of 1964, but that Congress adjourned without any action taken by the full committee or by the House itself.

In 1969, a historic docking took place, although not nearly as significant as what we are anticipating within the coming hours. The Hart design bill in the Senate was reported out by the Judiciary Committee of the Senate as title III of the then-pending copyright bill. Since then, the two bills have been joined together and, as the subcommittee knows, were both passed as part of S. 1361 by the Senate last year.

I will not attempt at all, certainly at this time, to summarize the testimony at these hearings, but I will represent to the committee that they did cover the kinds of industry, commercial, economic, and cul-

tural questions on the need for design protection that have become familiar to this subcommittee in other areas. The closest parallel that I have seen through the years is the kind of testimony on the record-piracy question. Some of the same points were made, some of the same arguments were made. It was noteworthy that in this history, significantly in each industry, it was the small businessman who sought design protection, to protect the only weapon he had which was creativity.

My purpose today, however, is to explain the provisions of the bill against the background of present law.

The bill provides for a specialized sui generis type of protection in between copyrights and patents. I think everyone would agree, though, that it is much closer to copyright in its concept, but much more limited than copyright in its duration, in the scope of protection, in the kind of designs which are protected—no, I am sorry. The kind of designs that are protected might be broader than copyright, but the amount of protection, the kind of people who are infringers, the term, are much more limited than copyright.

Now, I think I can pass over quickly perhaps the inadequacies of present law because I noted that they were mentioned in Assistant Commissioner Tegtmeyer's presentation. Suffice it to say that the design patent which, as the subcommittee knows, is a variety of patents which protect appearance and not function, has been considered inadequate in a number of industries for, I would say, principally three reasons.

First, the standards are extremely high. The designer must introduce something that the world has never seen before. It must be a new step. It also must be a large step. In other words, it must not be merely the obvious next step because if it is, it is not considered an invention. It is considered obvious.

Now, this is a standard which many successful, attractive, and creative designs would not meet. The procedure requires searching in the Patent Office which takes as long as 2 years sometimes, during which time there is no protection. It is expensive in terms of fees, patent lawyer fees, and also the number of designs for which protection would have to be sought.

Copyright is potentially broader; it covers works of art, which is a rather elusive term, or has been through the years.

The first question is: Does "works of art" cover designs of useful articles? For many years, there were doubts. The Supreme Court resolved the doubts in the *Mazer* case, a decision which said that a work of art does not cease to be a work of art simply because it is embodied in a useful article.

As a result of this decision, the Copyright Office expanded its registration coverage, but still denied protection to works which—to designs which were not considered works of art, but you know, there is another thing wrong with copyright and that is for those relatively few designs which are covered the protection is actually too great. The term which is really geared to music, books, and other historic forms of copyright can, as the subcommittee knows, be as long as 56 years. Proposals in title I are to make it even longer. The remedies are rather broad in terms of catching within the net of liability innocent parties, retailers, and the like. So that the design bill, which I am finally going

to get to in terms of its provisions, seeks to grant protection in areas where protection does not exist today, but to grant it in a much more limited way than the copyright law would.

Turning to the bill itself, the standard of protection is that a design can be protected if it is the original creation of its author. Now, original in this sense means that it has not been copied from somebody else. The protected design need not meet the kinds of tests of novelty or unobviousness that I mentioned before with respect to a patent, and yet as the officials of the Copyright Office will concede, there are many designs, many works that are submitted which clearly are so common and staple as to merit no protection and this bill has a specific exclusion on such design, designs that are staple and commonplace, or even designs that are close to being staple and commonplace, and that is what I meant when I said it is in between copyright and patent. It is not as liberal as copyright, but it is far more liberal than patent.

The scope of protection: The original designer is protected basically only against the actual unauthorized copying of the design. If there is independent creation of the design, there is no infringement. Duration is a relatively short period—5 years with an optional renewal of 5 years.

Protection begins upon the making public of an actual article which embodies the design. I may say that in earlier days one could get registration simply by having a sketch or a picture and there was a suggestion in industry that that is too loose a concept. You have actually got to be on the market with an article.

Registration is more rigorous than it is under the copyright law. First of all, you must register within 6 months or you lose protection.

The administration of the bill is one point I would like to mention. As to where registration takes place, the bill simply indicates that there is to be an Administrator and the President is to designate that Administrator. In approving S. 1361, the Senate Judiciary Committee expressed the view that the Office of Administrator should be located in the Patent Office. I would say, however, that this is an administrative question, certainly beyond my purview today. But the Copyright Office is, of course, another possible agency or—we don't want to create new agencies, presumably—but presumably there could be some third.

There is no requirement for search as there is in the Patent Office, but the public is given an opportunity to petition administratively for cancellation. This is another attempt to allow industry to come in, hopefully, before anyone is sued.

The notice or marking provisions are much more liberal than copyright. They really, I guess, anticipated perhaps the liberality of title I. That is, there are incentives to put the notice on. Your remedies are sharply limited if you don't use the notice, but if you omit the notice, you don't forfeit protection of copyright as can happen today. As I mentioned, infringement is generally only against the actual maker of the copy, the copier or the importer of a copy. An innocent party generally, or retailers, processors, assemblers, are liable only under the most limited circumstances. Basically they are not liable for the infringement.

The remedies are similar on copyright. They provide for injunction, damages with a statutory provision, statutory damage provision, with a ceiling of $5,000, and so forth.

Finally, the relationship between existing design patent and copyright. The new title II would not affect the availability of design patents, but protection under title II would end if somebody went out and got a design patent. That is so much broader that if he got the patent, he would not need the protection under the bill.

Basically the bill does not either expand or contract the scope of copyright coverage. Copyright works which are embodied in useful articles are eligible for protection, but it is optional with the proprietor in that situation. Some proprietors might prefer to have it, to avoid the elusive work-of-art concept, get the 5 or 10 years' protection under this bill, and let it go at that, but if they do not do it, then copyright would remain. As I mentioned above, the purpose of the bill was to achieve the balance that the draftsmen thought was needed in this area. They sought to afford a moderate protection to original designs which may not be considered either inventions or works of art.

The protection is available relatively quickly. It is available without undue expense. The scope is no broader than actually needed. It extends only to copying and not to independent creation. The term is short but was felt to be generally sufficient.

I would, of course, be happy at this point, or at any subsequent point, to answer any questions that the subcommittee might have.

Mr. KASTENMEIER. Thank you, Mr. Latman.

Is title II as written entirely acceptable to you? Do you see any amendment to it, any change that you would recommend?

Mr. LATMAN. Well, it is a difficult question, Mr. Chairman, only because I have to perhaps picture a—picture which hat I am wearing. As someone who tried to effect the various compromises, I am satisfied. However, there have been a couple of suggestions made quite recently which I would certainly have no objection to.

One was made by Assistant Commissioner Tegtmeyer who did indicate that the early protection here might jeopardize protection under foreign statutes, and I would say that that is a good point, and that I would certainly have no objection to giving the proprietor or applicant an option as to whether to follow the route that the Assistant Commissioner suggests, and that is not make the design public until it is registered, if he feels that he does not want to forfeit foreign protection.

Second, there has been a suggestion, indeed by my own clients in this other phase, concerned with the section 220(a), which parallels the provision in title I permitting somebody to go to court even though they don't have the certificate of registration. That applies in title I, and title II. If you apply, you pay your fee, you submit the papers and deposits that you are supposed to, but the Register of Copyrights under title I or the Administrator under title II says you are not entitled to protection, then, unlike the general thinking of what the current law is, you can go to court anyway and sue and join the Administrator—you don't join the Administrator. You notify the Administrator.

The suggestion has been made that this is in a new area and that was in the type-face area, but I would say that I would have no objection in general to modification of that provision.

Mr. KASTENMEIER. If indeed you may desire at any time to communicate to the committee in a particular sense, rather than in the general sense of discussing the bill in terms of modification as well, in

the sense that you may not have covered those this morning; you may do so.

Let me ask you a couple of general questions to put this into context. How do you respond to the charge or the comment that really title II shouldn't be in this bill, that it is riding piggyback on the revision bill which deals with many contentious matters and sort of as a center ring question that this is not the central question, not necessary to the bill, and therefore should be dealt with separately, particularly because you have described it as having a character of its own, not wholly copyright, not wholly patent law? How would you respond to that, Mr. Latman?

Mr. LATMAN. I would think, Mr. Chairman, that it would be entirely appropriate to have it joined in one bill. There are a number of reasons for this.

First, it is historic. Actually as I recall the very early days of the revision program in the Copyright Office itself starting in 1955, design and copyright generally were considered as part of the same overall problem. The reason that the design bill started out separately in 1957 was almost a question of timing, that the bill had crystallized in a form that the emerging copyright studies did not permit for copyright generally. So I would say that is one reason. I mean, in other words, it is not the fortuitous docking in 1969. It actually started out, I think, as part of the same problem.

No. 2, I think a lot of the considerations that this subcommittee has heard, and will hear, copyright issues, protection, users, and the like, do have enormous parallels in title II.

And third, I don't—in terms of the piggyback concept, I do think that this bill has shown, at least certainly in the Senate, that it could stand on its own feet in the terms of pros and cons and in terms of the historic action of this subcommittee in 1964.

I don't mean to suggest that those considerations are exhaustive or need bind this committee, but I think it shows that the bill can stand on its own feet and therefore should be appropriately combined.

Mr. KASTENMEIER. To the extent, Mr. Latman, that this creates new rights or new remedies, and I ask you this in—as a possibly difficult question, what economic effect will the bill in its present formulation have? Presumably, there will be some persons or entities that will have to come to account with those who register designs. Who will be affected and how will they be affected? Can you tell the committee?

Mr. LATMAN. Yes, Mr. Chairman. To begin with, I think there has been some experience with this. A lot of the same people who clamored for design protection originally have actually gotten protection under copyright. I am referring to the textile people and the jewelry people, people of that type who were among the early supporters of the design bill. Because they also fought the battle on the judicial front and the administrative front, they were able to get protection. I think we have the experience in that.

I do not think experience has shown that one pays more for a copyrighted textile design or a dress made from it than one would from an uncopyrighted design. This parallels experience in the more traditional copyright areas. You don't pay, fortunately or unfortunately, more or less for a paperback of Dostoevsky than you do for other books.

I think the same is true of music. You don't pay less to go to hear Tchaikovsky than to hear Aaron Copland; so I think that has been the experience both generally in copyrights and in specific design areas. In most industries you are not talking about true monopolies. In certain industries that may be true, but we did not find that during the hearings or any of the other explorations. We did find that it tended to be the small innovative manufacturer and designer who sought protection.

Mr. KASTENMEIER. I have used up my 5 minutes. I call on the gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

Would you please tell me how the design section would promote the progress of science and the useful arts?

Mr. LATMAN. Yes, Mr. Danielson. I believe it would in the sense of stimulating and providing incentive for creativity in many fields in this country in which we, I believe, have gotten used to playing second fiddle to other countries. I think, for example, of the allure of Scandinavian modern furniture or of English bone china or of other areas in which the designer in foreign countries is better protected than he is in this country. I certainly don't think there is a lack of talent here, but I think——

Mr. DANIELSON. I am not thinking about there, but I am thinking about our basic law, the Constitution. Sweden does not have the U.S. Constitution. I am only thinking in that context.

Mr. LATMAN. Well, I think that just as the basic constitutional concept is to provide economic incentive to creators and producers of copyrightable material, the same philosophy should guide——

Mr. DANIELSON. Only to the creators of copyrightable material. It says authors in the Constitution.

Mr. LATMAN. Yes. That certainly is true. It would be the creators, but in order to make their economic tool valuable, they have to have the right to exploit it and market it through producers. But I certainly agree with you. The Constitution says authors and this bill does protect the designer, the creator. And I am saying that the same philosophy as enunciated by the Supreme Court in the *Mazer* case; namely, that science and the useful arts can best be promoted by granting economic incentives, that is how that clause was interpreted.

Mr. DANIELSON. I don't doubt that is the purpose. In fact, that is our only purpose, to protect—to promote the progress of science and the useful arts.

Mr. LATMAN. I agree, but the Supreme Court said the method the Founding Fathers picked to promote is to grant copyrights, patents, and related works.

Mr. DANIELSON. Where did the Founding Fathers say we provide the right to protect——

Mr. LATMAN. It did not say it just as you say it. I think the question should be whether you feel there is a need for creativity and incentives for creativity. But let me say this, Congressman. I think that in certain areas, as I indicated earlier, copyright and patents do cover and sort of overlap and in certain cases grant too much protection. So I think that to the extent that one is concerned that the constant expansion of the copyright concept of works of art—because, after all, what are we talking about in design? We are talking about fur-

niture. We are talking about silverware. We are talking about lighting fixtures. Some of this material may end up getting protected under copyright, in which case I submit there will be too much protection.

So what I am saying is that this bill is an attempt to promote the progress of science in useful arts by taking a moderate middle ground and therefore trying to protect designs that deserve protection, but to protect them in a moderate equitable way.

Mr. DANIELSON. The impression I get, my perception from your presentation, which is quite scholarly, is that design is hard to fit under patent law. An application for a patent is often turned down because of the lack of either novelty, inventiveness, or unobviousness. And you have to make a search first and a search is awfully difficult when you are talking about just a few little variations in the ornamental qualities of something. So you feel that since—you even stated in your statement that frequently patents are turned down on design. So let's move over into the field of copyright. Maybe that would be easier. In effect, that is the bottom line of your presentation here and I would just like to know—it might be something real desirable, but how do you justify that in light of the Constitution?

Mr. LATMAN. Well, I have to respectfully modify, if I may, one of the terms you used. It is not—we are not moving over into copyright. We are moving in between. We are closer to copyright and I know we are getting a little metaphysical on this.

Mr. DANIELSON. We don't have a thing called a patent right. We have copyrights and patents.

Mr. LATMAN. We can. In other words, the Constitution does not use the words "patents" or "copyrights." It says you can protect writings and inventions. There have been two devices that Congress has so far used. One is called the copyright, one is called the patent. There have been scholarly writings on this very subject of the design bill which show it is writing; it can be considered a writing. Therefore, what I am suggesting is the best thing is not to move all the way over to copyright. I think that is almost as bad as sticking all the way over in patents, but I think the best thing to do is get the inbetween protection and that is what took about 10 years and I am not suggesting you accept it on faith. I am just saying that is what took 10 years and the kind of testimony I referred to earlier will show you, testimony of the designers and others who indicated the need for protection.

Mr. KASTENMEIER. The gentleman's time has expired. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I am going to pass, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I just have one question. We have this constitutional provision, but suppose there was no such thing in the Constitution. Suppose there was no language in the Constitution at all. We could still enact what we know as copyright and patent laws, couldn't we?

Mr. LATMAN. I imagine you would have to link it to another congressional power such as interstate commerce, perhaps, yes.

Mr. PATTISON. But on that, for instance——

Mr. LATMAN. Yes, which effectively I suppose would do the same, but this really comes from the same philosophy. When you think that *Mazer* v. *Stein*, Supreme Court case in 1954, involved a human figurine used as a lamp base and there were cases all over the country and the

circuits were splitting, on is this art, is it utility, is it functional, could you get a design patent for it, and if you can get a design patent, does that preclude copyrght? These were the kinds of questions and the Supreme Court in this very same case talked about the economic incentive that I mentioned to Congressman Danielson a moment ago, upheld copyright in that lamp base.

Now, all the philosophical questions that have been raised this morning in that sense were answered with respect to this human figurine. I am not that familiar with the subcommittee's rules, but I see the Congressman shake his head, and I would love to answer him.

Mr. DANIELSON. If the gentleman would yield, I want to make it clear I do not agree. The Supreme Court has been working with a 1909 law. They have been doing the best they can to improvise. We hope to give them a new law in the future, so I just simply don't—my philosophical doubts have not been answered.

Mr. LATMAN. Except, Congressman, the Supreme Court at that point was construing the Constitution. I agree with you. And I have been privileged to have experience with some of these issues such as photocopying which have crossed against the 1909 act, but I don't think this one does.

What I am saying is, suppose instead of the human figurine that you had in the *Mazer* case, you had a very modern, Howard Miller or Lightolier or—I am just thinking of some of the companies—functional type looking design which nevertheless was ornamental in the legal sense. The Copyright Office says *Mazer* v. *Stein* doesn't fit that and yet the Copyright Office—and I gather it has been part of their historical support of this bill—says that they don't think that a distinction should necessarily be made as a matter of legislative policy between something that happens to be representational, such as a human figurine used in Mazer against Stein, and a more sleek modern look which they don't think comes under works of art, but which they think is equally entitled to protection. But the protection that would be obtained, I must suggest again, is a short-term focused, limited type of protection. But I do think that the Constitution justifies such enactment and I do think that the policy justifies it.

Mr. PATTISON. I just want to follow that question a little bit because my point is that it would appear to me that the constitutional provision is not a limiting provision. It says that the Congress shall have the authority to do this, to grant protection for this purpose. But I am not at all sure that that is anything more than a suggestion by the framers of the Constitution that that is something the Congress might want to do, and I am not at all sure that that limits us to those particular—the particular words of that constitutional provision. Maybe I am wrong about that. Is it limiting or can we simply enact any kind of protection law that we want to for unuseful things?

Mr. LATMAN. Well, I think that in order to enact protection for useful or unuseful things it would have to either be a writing or a discovery. Those are the two words that the Constitution uses.

Mr. PATTISON. So that you are saying the Constitution does limit our powers.

Mr. LATMAN. I think I would have to say yes, Congressman, that it does, but I don't think there is any question, and there have been some scholarly writings on the subject, that the material we are talking about

would fit in either as a writing or potentially as a discovery and I cited Mazer against Stein to say that a lamp in that case was held by the Supreme Court to be a writing.

Mr. PATTISON. Yes, but obviously other countries don't have that provision. I would think we are probably unique in having that provision in our Constitution. Other countries have been able juridically to enact copyright laws and patent laws, so absent that provision in the Constitution, obviously we could enact any kind of copyright or patent law we want to, whether it was for works of art or phonorecordings, or anything else that new technology has brought along. So that—my question is, does that in fact limit us to those particular points?

Mr. LATMAN. I suppose my answer would be in fact it does not limit you. Potentially the language could limit you, but I don't think it limits you in what you have done in phono recordings, and so forth, and I don't think by any means it would limit you in protecting designs.

Mr. PATTISON. Thank you.

Mr. KASTENMEIER. The gentleman's time has expired. The gentleman from California, Mr. Wiggins.

Mr. WIGGINS. I pass.

Mr. RAILSBACK. May I ask a question?

Mr. KASTENMEIER. The gentleman from Illinois.

Mr. RAILSBACK. The Justice Department seems to be opposed primarily because of those provisions which relate directly to the United States. In bringing action against the United States in the Court of Claims, what is their objection, the Justice Department's objection?

Mr. LATMAN. Well, in fairness, I think their objection goes beyond that. They do mention that and they spend a lot of space talking about that provision, but I think it goes beyond it. It is, if I may say with due respect to the Department, a fairly standard response that they have given to this problem for many, many years. I think it does not carefully analyze either the need or the provisions of the bill. I think it is a broad gaged shotgun type of opposition to this type of bill.

As I indicated, I think most of the arguments have been answered throughout the hearings, and I don't recall, for example, anyone from the Justice Department ever being much more specific or ever, I believe, testifying in person against the bill. It is a fairly standard response. But in fairness, I think it goes beyond, Congressman, the Government—suit against the Government.

Mr. RAILSBACK. It may, but they certainly don't make it very clear. They seem to recite all of the provisions of title II and then they say of particular importance is the revision proposed for title 28, U.S.C., 1498(a), to provide that whenever a registered designer invention is used or manufactured by or for the United States without license of the owner thereof, the owner's remedy shall be by action against the United States in the Court of Claims, and then they go on to extensively discuss that.

What I am wondering is are they objecting to the concept of a kind of in-between remedy, between patent and copyright?

Mr. LATMAN. In fairness, I think they are. I think they are.

Mr. RAILSBACK. I see.

Mr. LATMAN. I think the reason, if I may suggest, it comes across to you the way it does is quite justified because I don't think they

indicate really the basis of such opposition or any kind of detail or policy.

Mr. RAILSBACK. Right.

Mr. LATMAN. Kind of blanket statement that is lost within the rest of the discussion.

Mr. RAILSBACK. All right.

Mr. LATMAN. And I do suggest that this has been a historic thing. It has been counterpoised through the years by the Commerce Department, the Library of Congress, in support of the bill.

Mr. KASTENMEIER. The Chair will announce that a notice quorum has been succeeded by a live quorum. In order that those members who are here may attend and record their presence on the floor, we will not recess for quorums. We will recess for votes.

I have one or two other questions because this is an important subject. It is a subject which would otherwise have been entitled to definite consideration as separate legislation.

First, the Office of Administrator in the bill doesn't locate that Administrator. In fact, it doesn't really identify the Administrator other than to say the Administrator and Office of the Administrator referred to in this title such be such officer and office as the President may designate. We don't know whether—this individual is not referred to as an Administrator for design patents or ornamental designs or anything else. Should the Administrator be further defined in terms of function, do you think?

Mr. LATMAN. I would think that could be a healthy thing. Are you asking, Mr. Chairman, whether the Administrator should be identified in the bill as a particular official?

Mr. KASTENMEIER. The only identification is that there is an Administrator and Office of the Administrator. Presumably in practice, if created, the Administrator will have to be further identified.

Mr. LATMAN. Well, I think there were always considered four mathematical possibilities, but only two realistic ones, and maybe I should address myself to those. The four mathematical possibilities are the Copyright Office, the Patent Office, some other existing agency——

Mr. KASTENMEIER. Such as the Department of Commerce.

Mr. LATMAN. The Department of Commerce or some new agency, and quite early in the game legislators indicated that didn't seem to be too realistic a proposition for this small problem.

I would say if the committee chose to designate the Copyright Office or the Patent Office, the Register of Copyrights or the Commissioner of Patents, I think that might be a healthy thing in the bill and, as I indicated, the Senate Judiciary Committee suggested it be in the Patent Office. I think there are strong arguments both ways that I think it would require probably consultation with the two offices in terms of budgetary needs, which was done, incidentally, at the last Senate hearing. It was on the basis of that kind of analysis that the Patent Office was able to indicate its receptiveness.

Mr. KASTENMEIER. I would only observe that perhaps the Senate would not necessarily take the point of view that the House has in recent years. It is certainly on the floor to be viewed very critically, as the creation of a new Federal bureaucracy, in terms of function, cost, and the like. Any such measure once it got to the floor would be subject to very severe scrutiny by the House as a whole.

Mr. LATMAN. Yes. I would think that it would make a lot of sense for the committee, if it so chose, to designate right in the bill either the Patent Office or Copyright Office. Now, in that connection, the fees which were suggested some years back of $15 were felt even at that time to be significantly inadequate to be self-sufficient, and so it may well be that current data on that would be required and that fees be more realistic because I think this would be the kind of operation that appropriately should be self-sufficient.

Mr. KASTENMEIER. My last question is one that relates to the time of commencement of protection. In European countries, in patents, protection commences with date of filing. In this country on a first to invent basis rather than first to file. I am asking you, Mr. Latman, what is the principle here? Presumably it is publication, first publication, rather than first registration, that will determine the protection.

Mr. LATMAN. Well, if you are talking——

Mr. KASTENMEIER. For the person entitled to protection.

Mr. LATMAN. No. I don't think that the commencement of protection provisions does relate to the question of who gets the protection. I don't think it does relate to that. Just as I think in the patent situation, protection begins against the world generally in this country upon the issuance of the patent. But, as the Chairman indicated, who is the true inventor would require analysis of who invented first.

This bill comes from a different philosophy. In this respect again it harkens back to copyright. You could theoretically have two people having rights if they created the work independently of each other, but their protection would be correspondingly limited. Their protection is only against somebody who copies from them.

This has resulted in what we in the copyright situation call a rough and ready justice and that is that they are not subject to esthetic considerations—hey, this is good; it should be protected—but indeed if it is a very commonplace thing under copyright nobody will need, you may say, to copy from that one of many versions.

The same would be true here. So it would be I think set up that way which would not relate to when protection begins.

Now, when protection begins, as you indicate correctly in section 204(a), is upon publication. They use a separate word because we try to get away from the gloss on publication. And it is this protection that Commissioner Tegtmeyer suggests be modified to allow protection on registration, and my suggestion this morning was that this should be an option similar to the way there is an option under copyright or, indeed, in certain cases or, indeed, would be under title I or under your recently introduced bill, Mr. Chairman, across the board, and that is a person could secure registration of unpublished works. So I suggest, in effect, giving the same kind of option here.

Mr. KASTENMEIER. Do you contemplate that there might be contests between individuals as to who is the first designer of a piece of commercially useful ornamental design?

Mr. LATMAN. Well, there might be in the same sense as there would be today in that sometimes in copyright infringement suits, both the plaintiff and defendant have certificates of registration from the Copyright Office. This is a disconcerting concept, I guess, when one first hears it and certainly when a judge, unfamiliar with copyright, first hears it, and really what is battled out in that contest is who originated it and who copied from whom.

Now, potentially, theoretically it is possible that neither copied from the other, but usually it doesn't work that way. So, I think in a realistic sense, the answer is yes, that in such a situation there would be a contest. Here again, in order to be more moderate, to give the public, the users, more remedies than they have under copyright today, there is a formal proceeding right within the office where you can petition to cancel a registration, and one of the grounds for cancellation would be that it was not an original, not created by the person who got the registration.

Mr. WIGGINS. Mr. Chairman——

Mr. KASTENMEIER. The gentleman from California, Mr. Wiggins.

Mr. WIGGINS Thank you, Mr. Chairman.

Mr. Latman, I know so little about this subject that it frightens me that I am sitting here and you are sitting out there, but I am going to try, and if I ask questions which would indicate that I would fail your class in this field, please bear with me at least for a while.

It appears to me that when an article subject to protection is made public which is a momentous event in this law, that certain rights attach at that time, and they endure for a prescribed period of time.

I am wondering if that event, making public a protected design, is a sufficiently certain and notorious event that there is really certainty to it. I am concerned about that because alternatively we may attach protection at some other more definite moment in time, such as registration.

If you would like to comment on that, I would appreciate it.

Mr. LATMAN. Well, certainly in both respects, certainty and notoriety, you are correct, Congressman, that registration would be a more certain moment and could, by the publication of an official gazette in effect be more notorious. I think those considerations might lead you to prefer protection from that moment. The compromise that was effected was this, was the actual article language. There was fear at the other end of the spectrum that someone should not be able to make public a little sketch, let's say, of a lighting fixture or automobile or egg beater and if you required him to have an actual article that that was going somewhat toward having something that was more notorious.

Certain people said it should be an actual article, not even a mockup, that that was insufficient. It should be something in the real marketable world, similar I suppose just by analogy to a trademark use. You have got to have an actual article and you have got to ship one article so long as it is bonafide in interstate commerce. So I guess this is—I think the fear of waiting for registration is that there will be a delay, that there will be no protection during the interim. The person cannot market during the interim. I would not consider it—especially in view of the Commissioner's comments, I would not consider it unreasonable if the committee felt they wanted to move to that other route and start protection from registration. I can see the point that you are making and I think that that would probably be acceptable.

The only fear was that we would somehow slip into a situation similar to the situation in the Patent Office, but it would be such an inordinate delay that protection would be illusory by the time it came.

Mr. WIGGINS. All right. I think I understand the considerations on both sides.

Mr. LATMAN. Thank you. Of course, I need not say your preliminary remarks were unnecessary. You would not, of course, fail any exam that I know of.

Mr. WIGGINS. Not in today's age, no.

Mr. KASTENMEIER. If there are no other questions, Mr. Latman, the committee appreciates your appearance here this morning and your contributions in terms of explaining title II and what it is and understands your support of it.

Mr. LATMAN. Thank you very much, Mr. Chairman. Of course, I do request that the statement that I submitted be included in the record.

Mr. KASTENMEIER. Without objection it will be received.

Mr. LATMAN. Thank you very much, Mr. Chairman, and members of the subcommittee.

[The prepared statement of Alan Latman and his letter of July 18, 1975, and attachment thereto follow:]

STATEMENT OF ALAN LATMAN ON TITLE II OF H.R. 2223 BEFORE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND ADMINISTRATION OF JUSTICE OF THE HOUSE JUDICIARY COMMITTEE DELIVERED ON JULY 17, 1975

My name is Alan Latman. I am a member of the law firm of Cowan, Liebowitz & Latman, P.C., 200 East 42d Street, New York, New York and a member of the New York and District of Columbia Bars. I am also an Adjunct Professor of Law at New York University School of Law. I am honored to have been invited by the Subcommittee to testify on the background and provisions of Title II of H.R. 2223, the "Design Protection Act of 1975", or as it has long been known, "the design bill".

I am testifying in my individual capacity on this subject, although I am counsel to two organizations which are also appearing before you on a slightly different subject this morning—International Typographic Composition Association & Advertising Typographers Association.[1]

One thing is indisputable about Title II—its venerability. It is older than Title I, having first seen the light of legislative day in 1957 when it was introduced by Chairman Willis of this Subcommittee at the request of the Coordinating Committee of the National Council of Patent Law Associations. The chairman of the Coordinating Committee was Giles S. Rich, presently a Judge of the United States Court of Customs & Patent Appeals. Judge Rich presided over a drafting committee composed of acknowledged leaders of the patent bar, assisted by equally distinguished government advisors such as Pat Federico of the Patent Office and George Cary and Barbara Ringer of the Copyright Office.

The Willis Bill of 1957 as drafted by this group was then subjected to a refinement process, spearheaded by an industry clearing house called the National Committee for Effective Design Legislation. This group operated from 1958 for about a decade of drafting, redrafting, and compromising in accordance with the continuing experience of industry and the bar. I served as counsel of this National Committee throughout its years of operation.

The legislative developments surrounding this bill through the late 1950s and 1960s was extensive. The Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee held three sets of hearings on the bill and the Senate passed the bill three times. The bill was consistently supported by the Patent Office and the Copyright Office and consistently opposed by the Justice Department in a statement similar to the one submitted to you this Spring.

The most intensive consideration of the bill in the House was in 1963, when a hearing was held before this Subcommittee which then reported the bill out in August of 1964. The 88th Congress adjourned before action was taken by the full committee or the House itself.

In 1969 a historic docking took place (not quite as historic as the events planned for this week). The Hart design bill in the Senate was reported out by the Senate Judiciary Committee as Title III of S. 543, the Copyright Revision Bill. Since then the design bill and copyright laws have been joined and as the

[1] I have also served as counsel to the National Committee for Effective Design Legislation which I will refer to later.

Subcommittee knows, were both passed as S. 1361, September 9, 1974 by the Senate. A summary of these legislative developments is appended to my written statement.

The hearings held in the Senate and House documented the economic, social and cultural need for new protection for designs. The industry testimony presaged the evidence on the need for protection against record piracy with which this Subcommittee is familiar. It was noteworthy however that in each industry it was the small businessman who sought design protection for one of the few competitive tools he had—creativity. My purpose today, however, is not to cover these matters. It is simply to explain the provisions of the bill against the background of existing law.

The bill provides for a specialized *sui generis* type of protection in between copyright and patents. It is closer to copyright but is much more limited. An understanding of the provisions of this bill require an explanation of the inadequacies of present copyright and patent protection.

There are, of course, two types of patents. The type with which this Subcommittee is more often concerned is the mechanical patent, a grant by the Government protecting the functional operation of a machine, manufacture or process. In addition, of course, there are patents protecting appearance. The latter are called design patents and, in protecting the ornamental, rather than the functional, differ from mechanical patents only with respect to length of protection (the term for mechanical patents is seventeen years while design patents last for three and a half, seven or fourteen years, depending on the fee the applicant chooses to pay.)

In order to qualify for a patent, an applicant must introduce something new to a particular field. But he must do more than merely take a step forward—it must be a large step. The contribution must be such that it was not "obvious" to those in the field. These requirements are in the familiar parlance of the patent law, "novelty" and "invention" or "unobviousness".

It is apparent that many creative, attractive and successful designs in such fields as kitchenware, automobiles and furniture still fail to meet these high standards. In practice, results in the Patent Office and the courts have convinced many designers and manufacturers that design patents are too difficult to enforce. The courts in an infringement suit can find a patent invalid and do so often. And even if the requirements were not so high, it is apparent that judgments about appearance must be highly subjective and unpredictable.

In view of the requirement that a design be novel, a search of earlier designs, of course, must be conducted by the Patent Office before it can issue a patent. Until the patent is actually granted, the designer or manufacturer markets his design at his peril. Despite the intelligent and devoted work of the Patent Office in this regard, the time lag, which may be many months or years, is often crucial. These facts of life were acknowledged by Assistant Commissioner Tegtmeyer in his supporting statement on behalf of the Commerce Department submitted earlier to this Subcommittee.

Finally, the overall expense of design patents is much greater than the statutory fees mentioned above. Even such fees must be multipled by the relatively large number of designs introduced by many manufacturers each year, most of which designs are unsuccessful. But in addition, a manufacturer who decides to rely on a patent must usually first seek the advice and services of a patent lawyer. Thus the cost of a preliminary search and legal fees also add substantially to the expenses of securing a design patent.

A copyright is not as difficult to obtain as a patent. The author need only originate the work himself, that is, refrain from copying from someone else's work or from the common fund of works known as the "public domain". He can obtain a copyright not only for a book, play or musical composition, but also for a "work of art". Can the design of a useful article be considered a "work of art" as that term is used in the copyright statute? This is a question which troubled the courts and the Copyright Office for some time. The answer is that until the 1950s such designs were sometimes considered "works of art", but more often they were not.

However, significant pronouncements in the field were made by the Supreme Court in 1954 in *Mazer* v. *Stein*, 347 U.S. 201 (1954). The Court held that the usefulness of an article did not prevent its being a work of art: but the Court did not define what a work of art is. Involved in this case was a human figurine used as a lamp base. There can be little dispute that this traditional subject of sculpture must be considered a "work of art". But what of the many other desigms which do not so clearly fall within this classification?

The Copyright Office has taken the view that this decision does not offer any guide as to whether, for example, the shape of a chair or of an egg-beater is to fit within the category of a work of art. At the same time, the *Mazer* decision has certainly resulted in the expansion of copyright protection. For example, artistic drawings or paintings cannot now be denied protection because they are used on textiles. But as to these designs, different problems arise. Thus, the very technical provisions requiring a copyright notice are poorly adapted to such things and can result in unintended loss of protection. Moreover, the historic concern of the copyright law with books and music produce other inappropriate results for commercial and industrial designs. For example, innocent sellers of a pirated copy of a copyrighted work are fully liable as infringers. And the term of protection can be as long as 56 years. Thus, from several points of view, copyright does not provide the answer to industry for either effective or equitable protection of designs of useful articles.

Of course, the avenue offered by the common law of unfair competition, which was always of uncertain scope, was sharply curtailed in this field by the 1964 Supreme Court decisions in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). But even in the absence of these decisions a judicial solution to this problem may not include the limitations and safeguards required in this situation.

It was the purpose of the draftsmen of Title II to provide such limitations and safeguards. Turning to the bill itself, we find the following key provisions:

1. *Standard for Protection*—A design can be protected if it is the original creation of its author. An original design is one which *has not been copied* from someone else's work or from a design in the public domain. The protected design need not meet any test of novelty, unobviousness, or inventiveness. But the design cannot be staple or commonplace or close to it, nor can it be dictated by the function of the article embodying it.

2. *Scope of Protection*—The original designer is *protected only against the unauthorized copying* of the substance of his protected design. If the author of a similar design can prove that he created it independently, rather than through copying, no infringement has taken place.

3. *Duration of Protection*—Five years, with an optional second five-year term.

4. *Commencement of Protection*—Protection begins upon the public exhibition, sale or offering of an actual existing article embodying the design. This is called "making public" the design.

5. *Registration*—A claim to protection must be registered in a Government office within six months after the design is made known.[2] An Administrator is to be designated by the President. (In approving S. 1361 the Senate Judiciary Committee expressed the view that the Office of the Administrator should be located in the Patent Office). There is no requirement of a search or comparison with earlier designs, but a proper party is given the opportunity to petition the Administrator for cancellation of registration of a design not subject to protection.

6. *Notice or Marking*—Protection is not forever forfeited if the prescribed form of notice is omitted, though omission may sharply limit the design owner's legal remedies against infringers. The requirements as to form and position of notice are very flexible.

7. *Infringement*—The design owner may generally recover from anyone who without his authority, purposefully makes or imports articles embodying a copy of the protected design and cannot recover from sellers, assemblers, processors or innocent parties generally.

8. *Remedies*—

(a) Injunction;

(b) Damages, which the court in its discretion can increase to $1.00 per copy, or $5,000., whichever is greater;

(c) Possible forfeiture or destruction of all infringing articles, plates, molds, etc.;

(d) Recovery of costs and possibly attorneys fees.

9. *Interrelation with Design Patent and Copyright*—

(a) The new design protection does not affect the availability of design patents to those design inventions which qualify. Protection under the new law would, however, terminate as soon as a design patent is issued.

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[2] There is the possibility of suing an infringer even if registration is denied.

(b) Basically, the bill neither expands nor contracts the scope of copyright coverage or protection. Copyrighted works which are subsequently utilized as designs for useful articles are specifically made eligible for protection under the bill. Thus, although a copyright proprietor utilizing his artistic work in this manner is not required to rely solely upon the design law for protecting his work as embodied in useful articles, he is afforded the opportunity to seek that type of protection. Where the proprietor of copyright in a work later embodied in a useful article *obtains registration* of the resulting design under the bill, he cannot thereafter claim copyright protection in *useful* applications of his work.

As stated above, the purpose of Title II is to achieve the balance required in this area. It seeks to afford moderate protection to original, commercial valuable designs which may not be considered "inventions", or "works of art". Such protection is available quickly, i.e., upon the marketing of the product; it is available without undue expense for the smaller manufacturer. The scope of protection is no broader than actually needed, extending only to copying and not to independent creation or merely selling. The term is short but generally sufficient.

I would, of course, be happy to answer any questions the Committee or its staff has either now or at a later date.

Recent History of Design Legislation

85th Congress

H.R. 8873 (Willis) introduced July 23, 1957, by request of Chairman, Coordinating Committee on Designs of National Council of Patent Law Associations.

86th Congress

S. 2075 (O'Mahoney-Wiley-Hart) introduced May 28, 1959.

S. 2852 (Talmadge) introduced January 19, 1960.

H.R. 9525 (Ford) introduced January 11, 1960.

H.R. 9870 (Flynt) Introduced January 25, 1960.

Hearings before Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, 86th Congress, 2nd Session, June 29, 1960.

87th Congress

S. 1884 (Hart-Wiley-Talmadge) introduced May 16, 1961.

H.R. 6776 (Flynt) introduced May 3, 1961.

H.R. 6777 (Ford) introduced May 3, 1961.

Hearing before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, 87th Congress, 1st Session, on S. 1884, August 15, 16 and 17, 1961.

Senate Report No. 1725 (Calendar No. 1684), 87th Congress, 2nd Session, dated July 12, 1962.

S. 1884—passed Senate—July 23, 1962.

88th Congress

S. 776 (Hart & Talmadge) introduced February 11, 1963.

H.R. 323 (Flynt) introduced January 9, 1963.

H.R. 769 (Ford) introduced January 9, 1963.

H.R. 5523 (Libonati) introduced April 8, 1963.

S. 776—passed Senate—December 6, 1963.

Hearing before Subcommittee on Patents, Trademarks and Copyrights of House Judiciary Committee on December 12, 1963, on H.R. 5523, 769, 323 [and S. 776] (Transcript never printed).

House Subcommittee reported bill out with amendments on August 12, 1964—no report printed.

89th Congress

S. 1237 (Talmadge & Hart) introduced February 23, 1965.

H.R. 450 (Ford) introduced January 4, 1965.

H.R. 3366 (Flynt) introduced January 25, 1965.

Hearing before Subcommittee on Patents, Trademarks and Copyrights of Committee on the Judiciary, United States Senate, 89th Congress, 1st Session, July 28, 1965.

S. 1237 reported with amendments by Senate Subcommittee on July 22, 1966.

S. 1237 passed by Senate on July 27, 1966.

90th Congress

H.R. 2886 (Ford) introduced January 18, 1967.
H.R. 3542 (Flynt) introduced January 24, 1967.
H.R. 6124 (St. Onge) introduced February 27, 1967.
H.R. 7870 (Tenzer) introduced April 3, 1967.

91st Congress

H.R. 3089 (Ford) introduced January 13, 1969.
H.R. 4209 (St. Onge) introduced January 23, 1969.
S. 1774 (Hart) introduced April 3, 1969.
Senate Subcommittee reported Bill out as Title III, S. 543, December 10, 1969.

93rd Congress

S. 1361, Title III (McClellan) passed Senate September 9, 1974.

[The following communication dealing with the typeface issue was received by the subcommittee from the Register of Copyrights:]

COPYRIGHT OFFICE,
THE LIBRARY OF CONGRESS,
Washingtton, D.C., June 6, 1975.

Hon. ROBERT W. KASTENMEIER,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. KASTENMEIER: In the course of my testimony before your Subcommittee on May 7, 1975, I was able to comment only briefly on questions concerning works of art and designs, including title II of H.R. 2223.

I believe that title II, the so-called Design Protection Act, is an important and much-needed piece of legislation, and I hope you will be able to schedule testimony on it during the current hearings. As you know, design legislation has been pending in Congress even longer than title I, the copyright revision bill itself, but no House hearings have been held on the question since 1947 and the last Senate Hearings were in 1967.

Equally important is the related question of protection for the designs of typefaces, which has become a major point of concern for the Copyright Office. To the best of my recollection, no issue of protection for typeface designs as works of art under the copyright law was raised during the early part of the revision program, including the period during which the bill was under consideration by your Subcommittee. I first became aware of typeface design as a major domestic copyright issue in the early 1970's when the widespread introduction of photomechanical processes for reproducing the printed word promised to alter the typographic industry radically.

In the Copyright Office, my predecessor, Mr. Kaminstein gave serious consideration to industry arguments that we should register claims to copyright in typeface designs as works of art. We had, and still have, a regulation [37 C.F.R. 202.1(a)] that has been interpreted to prohibit copyright registration for typeface designs, and the Copyright Office was urged either to change the regulation or to interpret it differently. Following Mr. Kaminstein's retirement the issue was reserved, but has been raised again during the past two years, both in the Copyright Office and in the courts.

Meanwhile, the technological developments in this field were being felt throughout the world, and resulted in a movement to obtain better international protection for typeface designers. The United States participated in the development of, but did not sign, the Vienna Typeface Convention of 1973, which would obligate members to protect original typeface designs for a minimum of 15 years under one or another form of law, specifically including copyright protection.

Shortly after I became Register of Copyrights, I was once more presented with the petition and arguments of domestic proponents of copyright protection for typeface designs, some of whom had been active in formulating the international treaty. However, I was also made aware of considerable opposition to any change in the Copyright Office Regulations to permit registration of typeface designs. To provide an opportunity for both sides to present their arguments openly, I held a public hearing on November 6, 1974, the first rulemaking hearing

ever held by the Copyright Office, and received testimony on the issues implicit in any change in the regulations affecting typeface designs. We specifically requested comment on five points. Written comments were received through January 15, 1975.

In my closing statement at the conclusion of a highly informative all-day hearing, I had to say that I felt I was "between a rock and a hard place." A strong case was made by each side. Proponents of a change in the regulation sought to demonstrate the significance of artistry in designing typefaces—a "beautiful group of letters," and the differences between the typefaces of different designers. Opponents of any change raised the issues as to the scope of my regulatory authority, and the practical ramifications of an administrative change in this case.

Among others, Irwin Karp, Counsel for the Authors' League, insisted that protection for typeface designs should be dealt with solely as a legislative matter. He said:

"We also believe that if any change ultimately ought to be made in the status of publishing typography—font and face—it should certainly not be done by the inflexible method of change in your registration regulations. Neither you or the regulations have the capacity to cope with multitudinous problems that would be created. . . .

"You are not a legislator. You can only say yes or no. Register or not register. And you can't mediate or modify the impact of that absolute judgment on many industries and the whole process of disseminating information and culture in this country."

[Transcript of Typeface Hearing, November 6, 1974, pages 83–84.]

As I indicated at the Office's hearing, I take this argument very seriously. I also believe that, implicit in the provisions of H.R. 2223 is the hitherto unexplored question of whether and to what extent typeface designs would be protected under the language of your revision bill, including the design legislation in title II. At the Office's hearing I asked proponents and opponents to reflect on the design bill as a possible solution to the question of protection for typefaces.

From the written comments, two primary issues emerged. First, the term of protection in the design bill is considered by many to be too short for typeface designs; enactment in its present form would not enable us to join the Vienna Typeface Convention. Some doubt was also expressed as to whether typeface designs are within the subject matter of the design bill, since the bill protects "ornamental designs of useful articles" and the various physical embodiments of typeface designs might not come within the bill's definition of "useful articles."

Under the circumstances, I believe it would be highly appropriate for you to schedule time at your hearings to receive testimony from both sides on the question of protection for type-face designs under either title I or title II of your bill.

Finally, I call to your attention the recent, very strong movement among individuals and groups of artists (painters, sculptors, and creators of fine, graphic and applied art) for more effective protection. Proposals have been advanced for amendments to the copyright law for this purpose, including registry schemes and opportunities for artists to share in the profits for later sales of their works. I believe these proposals deserve to be heard by your subcommittee, and that the current hearings would be enriched by testimony on them.

With my best personal wishes,

Sincerely yours,

BARBARA RINGER,
Register of Copyrights.

COWAN, LIEBOWITZ & LATMAN, P. C.,
New York, N.Y., July 18, 1975.

Re H.R. 2223.

Hon. ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and Administration of Justice of the House Judiciary Committee, Washington, D.C.

DEAR MR. CHAIRMAN: At yesterday's hearing on the above bill a question was raised as to the position taken by me at the hearing before the Register of Copyrights on the question of copyright protection for typeface designs. At the

hearing I stated that "[a]lthough I am expressing my own views on the copyright questions raised by the Register of Copyrights, I represent the International Typographic Composition Association and the Advertising Typographers Association of America, Inc. . . ."

I then stated the following: "My clients share my view that creative designing deserves its reward and that such reward is sometimes dependent on federal statutory protection. At the same time, my clients and I believe that copyright is *not* the proper vehicle for protection of typeface designs and that the established practice of the Copyright Office in refusing registration in that area is well-founded."

Later in my statement I noted that the National Committee for Effective Design Legislation "became convinced that a change in legislation was needed," and "I frankly think that today's proponents must follow the same route."

In suggesting the legislative route I made particular reference to the design bill, i.e., H.R. 2223, warning, however, that not all typeface designs "would be covered by such a bill; nor would protection under that bill be anywhere near as broad as under copyright." I had also anticipated some of the problems which were raised in the typeface phase of yesterday's hearing, suggesting to the Register that "the issues necessarily raised by any change of the present regulations and practice legitimately reflects economics, special antitrust considerations, compulsory licenses and other matters too fearsome to mention."

I trust that the foregoing clarifies the position I took on this issue before the Register. I enclose a complete copy of my written statement.

I found the opportunity to testify yesterday a rewarding experience and hope that my remarks will be of assistance to the Subcommittee.

Sincerely yours,

ALAN LATMAN.

STATEMENT BEFORE REGISTER OF COPYRIGHTS ON COPYRIGHT OFFICE REEVALUATION OF ITS PRESENT PROHIBITION OF REGISTRATION FOR TYPEFACE DESIGNS SUBMITTED BY ALAN LATMAN ON BEHALF OF THE INTERNATIONAL TYPOGRAPHIC COMPOSITION ASSOCIATION AND THE ADVERTISING TYPOGRAPHERS ASSOCIATION, INC.

My name is Alan Latman. I am a member of the law firm of Cowan, Liebowitz & Latman, P.C., 200 East 42d Street, New York, N.Y. and a member of the New York and District of Columbia bars. Although I am expressing my own views on the copyright questions raised by the Register of Copyrights, I represent the International Typographic Composition Association and the Advertising Typographers Association of America, Inc., whose combined membership includes about 350 small commercial and advertising typographers throughout the country. The average is well under $1,000,000 in gross sales.

My clients are the "man in the middle". As typographers they buy type fonts, traditionally from the same people who sell them typesetting equipment, to service graphic arts users such as advertising agencies, publishers, printers, public institutions, display media and other disseminators of the printed word, and industry and the public generally.

My clients share my view that creative designing deserves its reward and that such reward is sometimes dependent on federal statutory protection. At the same time, my clients and I believe that copyright is not the proper vehicle for protection of typeface designs and that the established practice of the Copyright Office in refusing registration in that area is well-founded.

As the Register noted, this is the first occasion where interested persons have been given the opportunity to present views in a more or less formal setting on a question of Copyright Office practice. To the extent that this affords the Register the opportunity to receive a broader spectrum of views than would otherwise be possible, it is to be commended. On the other hand, the Register may well come to feel like the sixth grader asked to give a book report on a book about penguins.

His succinct report was as follows: "This book tells you more about penguins than you want to know."

What I am suggesting is that the issues necessarily raised by any change of the present regulations and practice legitimately reflects economics, special antitrust considerations, compulsory licenses and other matters too fearsome to mention. I have no particular expertise in the technical or economic aspects of typography. I will, accordingly, focus on the matters within my experience—namely, copyright principles, particularly in the design area—reserving a few minutes for Walter Dew, Executive Director of Advertising Typographers Association, to present in a nutshell why my clients are here: in other words, why my views on copyright coincide with their views on the realities of the market place. There are present in the hearing room today not only Mr. Dew but Mr. Charles Mulliken, Executive Secretary of the International Typographic Composition Association, Gordon LaFleur, President of that association, and Charles Moore, immediate past President of the International Typographic Composition Association, all of whom are prepared to answer any questions the Register may have on the facts of life with regard to typefaces from the point of view of those who buy them and use them. And we will undoubtedly take advantage of the opportunity to supplement our testimony with written statements.

As the Register knows, my interest and involvement in the field of protection for creativity in design dates back more than 20 years. This interest for a number of years centered about my role as counsel for the National Committee for Effective Design Legislation, an inter-industry group of designers, manufacturers and their respective associations, seeking new federal legislation protecting designs against piracy. The efforts of this Committee are embodied in Title III of S. 1361 passed by the Senate two months ago and currently pending before the House of Representatives. This bill represents, in my view, the best thinking on an equitable and yet effective statutory route for protection of designs of useful articles.

Based on the arguments I have seen in favor of a change in Copyright Office practice, the proponents are here today for the same reason the NCEDL went to Congress. There was a difference, however, in the line-up of proponents and opponents: In my experience with the National Committee I found the small companies in every field seeking protection and the large companies tending to oppose; the reverse seems true in the present situation.[1] The reason is that the Copyright Law, as we know it, simply does not cover all designs of useful articles, even all creative ones. (Parenthetically, the relatively few designs qualifying as "works of art" under copyright receive excessive or inappropriate protection). The NCEDL became convinced that a change in legislation was needed. I frankly think that today's proponents must follow the same route. Indeed, the special circumstances surrounding the designing and marketing of typeface designs make these designs about the least likely candidates I can think of for preferred treatment under the Copyright Law. These circumstances include: (1) the function of type face designs and the constraints resulting from that function; (2) the fact that the ordinary observer is generally neither capable of, nor interested in, making the visual or aesthetic distinctions implicit in a copyright system. And notwithstanding my disclaimer of expertise, two glaring undisputed and highly unusual features of the industry: (1) type fonts are traditionally sold only by the manufacturers of the equipment on which they are used; (2) the fonts are not interchangeable or compatible on different equipment.

The parallel which strikes in traditional copyright terms would be a radio station which could only play songs chosen for recording by the company which manufactures its turntables. If this parallel seems farfetched because of the existence of compulsory licensing, I must say that the testimony this morning

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[1] The line-up of witnesses today is also significant in that the Authors League and its counsel Irwin Karp—who are the most sensitive of anyone in the country to the needs for protection of creative people—are opposing the change.

kept bringing to my mind the name of the Aeolian Company which, of course, posed the threat of a music monopoly in 1908 through its concentration of recording rights.

I believe I can furnish the rationale of my own position by simply addressing myself to the five areas highlighted in the notice of proposed rulemaking.

1. Whether type fonts, as "useful articles" can incorporate original design elements capable of being identified as "works of art" within the scope of the present copyright statute;

The Copyright Office's attempt to construe the statutory term "works of art", especially as embodied in "useful articles" is found in Section 202.10 of its regulations. As correctly noted in the question, type fonts are "useful articles." They function as mechanical contrivances to produce legible printed words on a page. The question itself echoes subsection (c) of this regulation, which provides:

"(c) If the sole intrinsic function of an article is its utility, the fact that the article is unique and attractively shaped will not qualify it as a work of art. However, if the shape of a utilitarian article incorporates features, such as artistic sculpture, carving, or pictorial representation, which can be identified separately and are capable of existing independently as a work of art, such features will be eligible for registration."

It is this subsection which thus bravely attempts to draw the line between "works of art" deemed copyrightable by the Office and attractive designs which are not. The hallmark to protectability of shapes of utilitarian articles is the incorporation of "features such as artistic sculpture, carving or pictorial representation which can be identified separately and are capable of existing independently as a work of art." It is difficult to think of any situation which fits this description less than type fonts, where the design elements are inextricably connected to the utility of the font in producing effective type. More independence of appearance can be found in the shape of a piece of Jensen silverware, an Eames chair or a Vacheron watch. However, none of these presumably is a work of art within the scope of the present law. Neither the silverware, the chair nor the watch "appears to be within the historical and ordinary conception of the term art." See *Rosenthal* v. *Stein*, 205 F.2d 633, 635 (9th Cir. 1953).

This definition from the Ninth Circuit *Stein* case (leading to *Mazer* v. *Stein*, 347 U.S. 201 (1954)) was, of course, applied to the Court of Appeals for the District of Columbia in holding that a phonograph record in the shape of a five pointed star is not a "work of art". *Bailie and Fiddler* v. *Fisher*, 358 F.2d 425 (D.C. Cir. 1958).

The shape of a letter of the alphabet is no more "art" than the five-pointed star. And although the notice in the Federal Register refers to recent judicial developments, I must say that I am not aware of any that have significantly altered this approach. Since I am not even exactly sure which cases are being referred to, I would appreciate learning them and having an opportunity to comment on them.

2. The distinctions, if any, between calligraphy, ornamental lettering, and typeface designs for copyright purposes;

"Ornamental lettering" presumably involves pictorial or sculptural features which are separately identifiable and capable of independent existence as a work of art under the standards discussed in the response to (1) earlier. It is, therefore, in sharp contrast to ordinary typeface designs and may often be copyrightable. I understand, however, that it is impracticable to create and/or market a typeface design consisting of ornamental lettering and that, accordingly, the problem is not a pressing one.

I'm not sure what is meant by the term "calligraphy" in the notice. "Calligraphy" connotes to me beautiful handwriting or penmanship. In the absence of hand-drawn, ornamental lettering, I should think even a beautifully shaped handwriting is not copyrightable but I would like to give this matter further thought if it is deemed of continued importance.

3. Whether a typeface design can, by its nature, incorporate the degree of originality and creativity necessary to support a copyright;

A negative answer to this question to some extent flows from and overlaps the negative answer to (1). "Originality" involved in producing an effective al-

phabet—or even simply an attractive one—calls to mind the effort to produce an effective fleurs-de-lis design for a label by the Forstmann Woolen Co. some years ago. As the Register knows, this effort was found to lack originality (*Forstmann Woolen Co.* v. *J. W. Mays, Inc.*, 89 F. Supp. 964 (E.D.N.Y. 1950)).

It is the nature and function of typeface designs, highlighted by Mr. Solo, as well as the experience of the Copyright Office, that justifies the conclusion that "mere variations of typographic ornamentation, lettering or coloring" are not subject to copyright. 37 C.F.R. § 202.1. This language merely exemplifies the § 202.10 concepts.

When I say the function of a typeface would seem to preclude copyrightable creativity, I am not suggesting that variations are impossible or attempting to demean the efforts of people like my respected neighbor from Croton-on-Hudson, N.Y., Ed Rondthaler. But once again it is difficult to think of an article whose appearance is more affected—if not dictated—by its intrinsic function than a typeface design. The elusive concept here is that the function itself is a visual one. But this doesn't make it an aesthetic, nonutilitarian function in the sense of the function of a painting. The function of type faces is similar to that performed by the finish on paper, the color of a traffic signal, the reflector on a road sign or lighting of a sculpture display, all of which must be carefully designed but without copyrightable creativity. Indeed, once again the very conventions which must be observed to make letters recognizable dictate appearance to a remarkable degree.

We are thus reminded not only of the temperature chart cases, but the printed circuit boards which I gather are still presented to the Copyright Office each year. These attractive mazes look the way they do because of the demands made by the circuitry involved. Typefaces look the way they do because they are designed to produce recognizable, legible effective alphabets.

4. Whether, for purposes of copyright registration, workable standards can be established for distinguishing "new" designs based on previously-existing typefaces from mere copies or minor variants of earlier designs;

I do not think workable standards can be established. But more significant is the fact that this question needs to be asked. The essence of "copyright registration" as we know it precludes "distinguishing" works submitted for registration from previous works. Thus, the question reflects the dilemma that would confront the Office if it modified its present policy and registered claims in typeface designs. The Office would either have to: (1) Modify its entire approach and engage in the kind of judgmental activity many people think is beyond its statutory authority [2] or (2) register claims in many designs which the Office knows essentially duplicate previously existing designs.

5. Assuming the potential copyrightability of certain typeface designs, the practical means of complying with the formal requirements of the copyright law as to notice deposit and registration.

Whether practical means may be devised for complying with notice requirements depends on the school of thought defining these requirements. See Doyle et al. "Notice of Copyright" 1 Studies on Copyright 237 (Arthur Fisher Memorial edition 1963). Under the more liberal approach, a single notice on an entire font, as it is sold, would be sufficient even if the notice never appears on the printed page. The dangers of innocent infringement have already been covered by other speakers.[3] A stricter approach would perhaps require a notice on each character each time it is produced. The fact that this would be impracticable does not necessarily mean that this stricter approach would not be followed: it may merely illustrate that the copyright statute was never intended to cover typeface designs.

Deposit and registration may raise other problems centering about whether each font of a particular typeface is a separate "work". I gather, for example,

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[2] This raises sub-dilemmas, e.g., (a) modification of the Office's entire procedure with respect to all works of art or even all classes of works or (b) inelegant discrimination in the case of typeface designs.

[3] Even greater dangers are created by the fact that "works of art" may be registered in unpublished form.

that different size type sometimes requires variant forms of a design for the letters to perform their function. Thus, for each design introduced there may be a dozen different "works" which would arguably be involved, with deposits and applications for registration containing appropriate "new matter" information for each.

These problems are, of course, not insurmountable. Again, however, they may well support the long-held conclusion of the Office that the statute was not intended to cover typeface designs.

I think the foregoing indicates that there is no sound reason to change Office practice and grant registration to typeface designs, leaving uncovered many other areas of creative design where the problems are less formidable. I think typeface designers should join the designers of other products in supporting the design bill. This is not to say that all typeface designs would be covered by such a bill; nor would protection under that bill be anywhere near as broad as under copyright. But the existence and progress of that bill is merely further confirmation of my view that copyright under the present statute is not the place for protection of typeface designs.

Mr. KASTENMEIER. Next the Chair would like to call three witnesses favoring typeface protection: Mr. Joseph Gastel, a copyright attorney, George Abrams, operator of Alphabets, Inc., a small typeface concern, and Mr. Michael Parker, official of a larger operation, Mergenthaler Corp.

Gentlemen, would you come forward, please.

Mr. Gastel, Mr. Abrams, and Mr. Parker, each of you has 5 minutes. Whichever of you would like to proceed.

Mr. GASTEL. I would, Mr. Chairman. My name is Joseph Gastel.

Mr. KASTENMEIER. Mr. Gastel, you may proceed, sir. Each of you has prepared statements which you have made available to the committee. Without objection, they will be received and made a part of the record, and should you care to vary or elucidate upon the statements, you may do so.

TESTIMONY OF JOSEPH GASTEL, COPYRIGHT ATTORNEY, ACCOMPANIED BY GEORGE ABRAMS, OPERATOR OF ALPHABETS, INC.; MICHAEL PARKER, OFFICIAL OF MERGENTHALER CORP.; AND HENRY LEEDS, COUNSEL FOR MERGENTHALER CORP.

Mr. KASTENMEIER. Incidentally, they are rather short statements. Perhaps you would prefer to read them verbatim.

Mr. GASTEL. Yes. This is my preference.

Mr. Chairman and members of the committee, my name is Joseph Gastel. I am an attorney and specialize in patent, trademark and copyright law. I represent International Typeface Corp., a developer and marketer of typefaces. My purpose is to present a few thoughts as to why there should be copyright protection for original typeface designs.

Broadly, typefaces are the shapes and configurations of letterforms which are assembled or set to produce printed material of all kinds, including advertising copy and text material.

In the past 15 years the typesetting industry has experienced a technological revolution.

Mr. WIGGINS. Mr. Chairman, I know it is impolite as well as almost out of order to interrupt a witness in his statement, but I would—it would help me so much if I could have a clearer understanding of what typeface is before you get into it.

Mr. GASTEL. Yes.

Mr. WIGGINS. As you explained it, sir, I understand it to be just the letter design and not the process.

Mr. GASTEL. That is correct.

Mr. WIGGINS. Just what it appears, like this is—this is a typeface.

Mr. GASTEL. Yes. The individual members are typefaces and altogether it is typeset material.

Mr. WIGGINS. Your testimony is going to the individual shape of the letter itself.

Mr. GASTEL. That is right. Individual shape of alphabets, entire alphabets.

Mr. WIGGINS. I understand. OK. That helps me, Mr. Chairman.

Mr. GASTEL. Now, actually here are what I will refer to as typeface fonts which I used in phototypesetting which is a card that is inserted into a machine showing a particular alphabet design.

Mr. KASTENMEIER. Perhaps it being the case that the panel is not necessarily familiar with the question, if I may, too, interrupt Mr. Gastel briefly to read a statement for the record from Dorothy Schrader, General Counsel of the Copyright Office. It is quite short. It may help. It is accompanied by a letter and it refers to typeface design.

[The material in question is as follows:]

COPYRIGHT OFFICE,
THE LIBRARY OF CONGRESS,
Washington, D.C., May 19, 1975.

Mr. HERB FUCHS,
Counsel, Committee on the Judiciary,
U.S. House of Representatives, Washington, D.C.

DEAR MR. FUCHS: In accordance with your request, I have prepared a brief summary of the status of the typeface issue. I will be gone from the Office until June 3. If you need additional information, please contact either Mrs. Wilma Davis or Mrs. Harriet Oler of my staff.

Sincerely yours,

DOROTHY M. SCHRADER,
General Counsel,
Copyright Office.

TYPEFACE DESIGNS

The Regulations of the Copyright Office now in force do not permit us to register claims to copyright in "mere variations of typographic ornamentation [or] lettering . . ." [37 C.F.R. 202.1(a)], and this prohibition has been interpreted to include typeface designs.

Because of technological developments, including widespread introduction of photomechanical processes for reproducing the printed word, typeface design "piracy" has become a serious economic problem for those who originate typeface design—designers, manufacturers, and franchisers of designs.

Those affected by "piracy" urge amendment of the regulations of the Copyright Office to permit registration of typeface designs.

The Copyright Office held a public hearing on November 6, 1974 to receive public comment from proponents and opponents of a change in the regulation. The enclosed announcements, ML–111 and ML–113, gave some background and requested comment on five specific points.

Each side made a strong case at the hearing. Proponents demonstrated the significance of artistry in designing typefaces and established differences between the typefaces of different designers. Opponents, however, made a major issue of the scope of the Register's regulatory authority and argued that an administrative change could not make the necessary provisions for all of the ramifications of a change.

The Copyright Office received written comment on the issue through January 15, 1975. We are in the process of evaluating the testimony given at the hearing and the written comments. No decision has been made one way or the other by the Register.

Title II of H.R. 2223 is the Design Protection Act. It is possible that adequate protection for typeface designs could be legislated by enactment of this bill. The Register intends to write Mr. Kastenmeier about the relationship between the typeface design issue and title II and urge hearings on this issue.

[Announcement from the Copyright Office, Library of Congress, Washington, D.C.]

Registration of Original Typeface Designs

The following excerpt is taken from Volume 39, Number 176 of the Federal Register for Tuesday, September 10, 1974:

Library of Congress

Copyright Office

[37 CFR Part 202]

MATERIAL NOT SUBJECT TO COPYRIGHT

The Copyright Office is considering amending § 202.1(a) of the Copyright Office Regulations to permit copyright registration for original typeface designs. The present Regulations prohibit registration for "mere variations of typographic ornamentation [or] lettering," and this prohibition is interpreted to include designs for type fonts within its scope.

This advance notice of proposed rulemaking is being issued to facilitate the widest possible public expression of views on the legal and policy questions implicit in the possible change in registration practices.

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire to the Copyright Office, Office of the General Counsel, Washington, D.C. 20559. Each person submitting a comment should include his name and address, and give reasons for his recommendations. A public hearing will be held on November 6, 1974, from 10 a.m. to 4 p.m. in room 1112, Building 2, Crystal Mall, Arlington, Virginia.

All communications received on or before November 15, 1974, will be considered by the Register of Copyrights and the Librarian of Congress before taking action on the proposed rule. If it is determined to be in the public interest to proceed further after consideration of comments received in response to this notice, a notice of proposed rulemaking will be issued.

The Copyright Office registers claims to copyright in accordance with Title 17 U.S.C. in "writings of authors," that is, original works of authorship in the form of literary, musical, dramatic, pictorial, and sculptural expression. Typeface designs have not previously been accepted for registration. In view of developments in the industry, judicial developments, and conclusion of an international convention in Vienna in 1973 aimed at an international system of protection for typeface designs under copyright or other legal theories, it is proposed that the validity of the present prohibition on registration for typeface designs be reevaluated. Comments are specifically requested in the following areas:

(1) Whether typefonts as "useful articles," can incorporate original design elements capable of being identified as "works of art" within the scope of the present copyright statute;

(2) The distinctions, if any, between calligraphy, ornamental lettering, and typeface designs for copyright purposes;

(3) Whether a typeface design can, by its nature, incorporate the degree of originality and creativity necessary to support a copyright;

(4) Whether, for purposes of copyright registration, workable standards can be established for distinguishing "new" designs based on previously-existing typefaces from mere copies or minor variants of earlier designs;

(5) Assuming the potential copyrightability of certain typeface designs, the practical means of complying with the formal requirements of the copyright law as to notice, deposit, and registration.

This advance notice of proposed rulemaking is issued under the authority of section 207 of the Copyright Code, Title 17 U.S.C.

Dated: August 29, 1974.

Barbara Ringer,
Register of Copyrights.

Approved by:

L. Quincy Mumford,
Librarian of Congress.

[FR Doc.74–20789 Filed 9–9–74;8:45 am]

[Announcement from the Copyright Office, Library of Congress, Washington, D.C.]

Registration of Original Typeface Designs: Extension of Comment Period

The following excerpt is taken from Volume 39, Number 223 of the Federal Register for Monday, November 18, 1974:

Library of Congress

[37 CFR Part 202]

Material not subject to copyright

This notice extends the period for comments to the notice published September 10, 1974 (39 FR 32631) on the question whether the Copyright Office should amend § 202.1(a) of its Regulations to permit copyright registration for original typeface designs.

Requests for an extension of time were made in writing by the American Patent Law Association and orally by several other interested persons. The additional comment time is necessary to permit a full and thorough consideration of the issues implicit in the possible change in the Regulations. Interested persons are invited to submit written data, views, or arguments to the Copyright Office, Office of the General Counsel, Washington, D.C. 20559. Each person submitting a comment should include his name and address, and give reasons for his recommendations.

All communications received on or before January 15, 1975, will be considered by the Register of Copyrights and the Librarian of Congress before taking action on the proposed rule.

The Copyright Office registers claims to copyright in accordance with Title 17 U.S.C. in "writings of authors," that is, original works of authorship in the form of literary, musical, dramatic, pictorial, and sculptural expression. Typeface designs have not previously been accepted for registration since the present Regulations prohibit registration for "mere variations of typographic ornamentation [or] lettering" and this prohibition has been interpreted to include designs for type fonts within its scope. Comments are specifically requested in the following areas:

(1) Whether type fonts, as "useful articles," can incorporate original design elements capable of being identified as "works of art" within the scope of the present copyright statute;

(2) The distinctions, if any, between calligraphy, ornamental lettering, and typeface designs for copyright purposes;

(3) Whether a typeface design can, by its nature, incorporate the degree of originality and creativity necessary to support a copyright;

(4) Whether, for purposes of copyright registration, workable standards can be established for distinguishing "new" designs based on previously-existing typefaces from mere copies or minor variations of earlier designs;

(5) Assuming the potential copyrightability of certain typeface designs, the practical means of complying with the formal requirements of the copyright law as to notice, deposit, and registration.

This advance notice of proposed rulemaking is issued under the authority of section 207 of the Copyright Code, Title 17 U.S.C.

Dated: November 12, 1974.

Barbara Ringer,
Register of Copyrights.

Approved by:

L. Quincy Mumford,
Librarian of Congress.

[FR Doc.74–26884 Filed 11–16–74;8:45 am]

Mr. KASTENMEIER. I read the foregoing as an introductory preface to the question before us.

Mr. Gastel?

Mr. GASTEL. Right. In the 15 years, the typesetting industry has experienced a technological revolution. There has been an extensive shift from the use of metal type to phototypesetting. In a typical example of phototypesetting, a machine composes words on photosensitive materials by photographing successive letters from a master alphabet font such as we have here, much as a teletype taps out letters line after line. Phototypesetting excels traditional metal typesetting in quality, efficiency of production, and in economy.

In accordance with the U.S. Constitution, article 1, section 8, Congress has the power to grant authors and inventors the exclusive rights to their writings and discoveries in order to promote the progress of the useful arts.

It cannot be denied that typeface design is a useful art. New letterform designs are created by typeface designers. It is estimated that the reasonable cost of designing a single new text typeface—that is, one that is used for printing books, or the like—is at least $10,000. This does not include the promotional cost of bringing the typeface to an international market, which may amount to another $20,000 to $100,000 or more. Even after this larger expenditure, the new typeface design may not be popular enough to justify the investment.

There is a need for new typeface designs to meet the changing requirements of the printing, advertising, publishing, and communication industries. This need is evidenced by the fact that knowledgeable businessmen will pay for new typeface designs, although it is estimated that over 10,000 styles are in the public domain and are free for use by anyone.

Historically, proprietary protection has been provided for typeface designs by design patents. It is estimated that in excess of 1,000 U.S. design patents on typefaces have been issued. The fact that design patents have been granted in the past is of itself evidence that typeface design is a useful art and is worthy of protection in accordance with article 1, section 8 of the Constitution.

There is a real need for protection of typeface designs by means of copyright. Now that metal type is being replace by printed film fonts, which are two-dimensional art rather than three-dimensional matrices, it is only appropriate that the protection be in the conventional form for printed graphic art, notwithstanding that design patent protection is still available. The deficiency of design patent protection is that the standards for patentability are very subjective, and each patent can be challenged through long and costly litigation procedures. In contrast, copyrights are much easier to enforce because the proprietary right is solely against copying.

The need for copyright protection is especially urgent now because film fonts are being copied very inexpensively by photography whereas this was impossible with metal type. Situations have already occurred where an alphabet has been marketed after the expenditure of considerable effort and great expense, only to be copied photographically with little expense by another and sold at lower prices after the new alphabet has become a success. This practice of unauthorized copying destroys the type design industry by discouraging the creation of

new alphabets, especially by smaller typeface design organizations. This, in turn, results in slowing of the progress of all industries which are directly and indirectly dependent on the use of typefaces.

The major portion of the typographic industry itself has acknowledged the existence of a valuable property right in typefaces by voluntary licensing. By way of example, International Typeface Corp. has 33 licensees, most of whom are phototypesetting machine or font manufacturers, who pay royalties on uncopyrighted and unpatented typeface designs.

In summary, by providing protection for original typeface designs by means of copyright, progress of the useful arts will be promoted. There will be a wholesome economic atmosphere for creating new typeface designs because the payment of adequate royalties to typeface designers will be enhanced. The flow of new typefaces will promote the progress of not only the printing, publishing, advertising and communication industries, but also the progress of other industries and businesses which rely on the foregoing industries for bringing their products to market.

Mr. Kastenmeier. Thank you, Mr. Gastel.

[The prepared statement of Mr. Gastel follows:]

Statement by Joseph Gastel, Attorney, International Typeface Corp.

Mr. Chairman and Members of the Committee: My name is Joseph Gastel. I am an attorney and specialize in patent, trademark and copyright law. I represent International Typeface Corporation, a developer and marketer of typefaces. My purpose is to present a few thoughts as to why there should be copyright protection for original typeface designs.

Broadly, typefaces are the shapes and configurations of letterforms which are assembled or set to produce printed material of all kinds including advertising copy and text material.

In the past 15 years the typesetting industry has experienced a technological revolution. There has been an extensive shift from the use of metal type to phototypesetting. In a typical example of phototypesetting, a machine composes words on photosensitive materials by photographing successive letters from a master alphabet font—much as a teletype taps out letters line after line. Phototypesetting excels traditional metal typesetting in quality, efficiency of producion and in economy.

In accordance with the United States Constitution, Article 1, Section 8, Congress has the power to grant authors and inventors the exclusive rights to their writings and discoveries in order to promote the progress of the *useful arts*.

It cannot be denied that typeface design is a useful art. New letterform designs are created by typeface designers. It is estimated that the reasonable cost of designing a single new text typeface is at least $10,000. This does not include the promotional cost of bringing the typeface to an international market, which may amount to another $20,000 to $100,000 or more. Even after this larger expenditure, the new typeface design may not be popular enough to justify the investment.

There is a need for new typeface designs to meet the changing requirements of the printing, advertising, publishing and communication industries. This need is evidenced by the fact that knowledgeable businessmen will pay for new typeface designs, although it is estimated that over 10,000 styles are in the public domain and are free for use by anyone.

Historically, proprietary protection has been provided for typeface designs by design patents. This protection originated when type was manufactured in metal. It is estimated that in excess of 1,000 United States design patents on typefaces have been issued. The fact that design patents have been granted in the past is of itself evidence that typeface design is a useful art and is worthy of protection in accordance with Article 1, Section 8 of the Constitution.

There is a real need for protection of typeface designs by means of copyright. Now that metal type is being replaced by printed film fonts, which are two-dimensional art rather than three-dimensional matrices, it is only appropriate that the protection be in the conventional form for printed graphic art, notwithstand-

ing that design patent protection is still available. The deficiency of design patent protection is that the standards for patentability are very subjective, and each patent can be challenged through long and costly litigation procedures. In contrast, copyrights are much easier to enforce because the proprietary right is solely against copying.

The need for copyright protection is especially urgent now because film fonts are being copied very inexpensively by photography, whereas this was impossible with metal type. Situations have already occurred where an alphabet has been marketed after the expenditure of considerable effort and great expense, only to be copied photographically with little expense by another and sold at lower prices after the new alphabet has become a success. This practice of unauthorized copying destroys the type design industry by discouraging the creation of new alphabets, especially by smaller typeface design organizations. This, in turn, results in slowing of the progress of all industries which are directly and indirectly dependent on the use of typefaces.

The major portion of the typographic industry itself has acknowledged the existence of a valuable property right in typefaces by voluntary licensing. By way of example, International Typeface Corporation has 33 licensees, most of whom are phototypesetting machine or font manufacturers, who pay royalties on uncopyrighted and unpatented typeface designs.

In summary, by providing protection for original typeface designs by means of copyright, progress of the *useful arts* will be promoted. There will be a wholesome economic atmosphere for creating new typeface designs because the payment of adequate royalties to typeface designers will be enhanced. The flow of new typefaces will promote the progress of not only the printing, publishing, advertising and communication industries, but also the progress of other industries and businesses which rely on the foregoing industries for bringing their products to market.

[Subsequent to the hearing the subcommittee received the following letters dated July 28 and August 8, 1975, from Mr. Aaron Burns, president of the International Typeface Corp. The exhibits to the July 28, 1975, letter have been retained in the subcommittee files.]

INTERNATIONAL TYPEFACE CORP.,
New York, N.Y., July 28, 1975.

Mr. HERBERT FUCHS,
Counsel to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary of the House of Representatives, Washington, D.C.

DEAR MR. FUCHS: At the public hearings held on July 17th, certain statements made by Mr. Daniel Ebenstein on behalf of Leonard Storch Enterprises, Inc., contained misinformation about International Typeface Corporation.

At the hearings there was no opportunity to refute these allegations. Following your request I am submitting this letter so that the true character of our company and its business may be known to you and the Committee.

It is believed that at the root of Mr. Ebenstein's effort to discredit International Typeface Corporation and others who advocate protection for type designs, is his client's practice of manufacturing phototypesetting film fonts by the direct "contact copying" method—in which the copy is made by photographic reproduction of another's font, thereby appropriating all of the basic work which went into the font without incurring any of the expense. (See Exhibit A) No amount of verbiage can obscure the fact that copyright protection of typefaces threatens the business of Mr. Ebenstein's client.

By way of background, in 1970 International Typeface Corporation (ITC) was formed to utilize the talents of Herb Lubalin, an internationally known designer, Ed Rondthaler and his company, Photo Lettering, Inc., a pioneer in phototypesetting for 40 years, and myself, a specialist in typographic design and advertising promotion.

ITC provides a service for typographic companies wherein all creative design, designers' royalties, unitizing and promotion costs for new typeface designs produced by ITC are initially borne by ITC. These costs are recovered by ITC through a license fee paid by subscribers. This license fee is usually a one-time payment based on the sale of each font. Substantially the only cost incurred by each subscriber is that of manufacturing the font. Thus no single manufacturer

bears the staggering costs associated with each new alphabet design because such costs are distributed among many manufacturers.

ITC's service offers manufacturers a selection of new or expanded alphabet families designed by professionals, unitized artwork for these designs as required by well established industry practices, and a complete advertising, sales promotion and marketing program which promotes and publicizes ITC typeface designs on a world-wide basis. Thus small companies which do not have facilities for creating new designs can offer their clientele new ITC typefaces at the same time that these are offered by their large competitors. Each ITC subscriber selects only those new typefaces which he desires and pays license fees to ITC only after such products are sold; there are no minimum requirements.

With the foregoing novel concept, for the first time since the introduction of phototypesetting, designers of alphabets could get a wide distribution of their designs and obtain a larger royalty return than was available to them through any other source. Previously, if they designed an alphabet exclusively for any one manufacturer and it was not made available to other manufacturers, it would be copied and the designer would lose the royalties.

The size of the number of companies having typesetting equipment is larger than set forth in Mr. Ebenstein's presentation wherein mention is made of 1,600 typographers for indicating the size of the industry involved. This number represents just the tip of an iceberg in comparison. There are many more concerns and organizations involved in the use of typesetting equipment and all kinds of fonts. For instances, there are 10,000 newspapers who use typographic equipment for their own publications and many for other commercial use. There are over 25,000 commercial printers, most of whom have some type of typographic equipment requiring fonts. In addition, there are tens of thousands of firms like insurance companies, department stores, banks, manufacturers, distributors and other commercial establishments who now have typographic equipment of some kind using fonts and many more who are planning installations of this type. One very prominent user is our government itself.

The market we are discussing is not 1,600 users of typographic equipment, but is nearer 50,000 to 60,000 and an anticipated increase according to my best knowledge to over 100,000. This is why, what we do now with alphabet copyrights, is so very important. The use of alphabets is increasing every day. It is important to protect designers on authorship of alphabets to encourage this huge expansion that is coming and which requires their talents.

Enclosed with this letter is a collection of printed materials and documentations produced and issued by ITC since its formation. This material is submitted as evidence of the true nature of ITC's business and its methods of operation. It documents the pattern of growth of ITC in the area of typeface design, marketing, and in particular, its role in an industry-wide campaign against typeface design plagiarism.

This material will clearly disprove and refute the false, misleading and irresponsible statements that are contained in Mr. Ebenstein's "paper" presented to the Committee and which are the cause for this letter.

As an independent source of typeface designs for film font manufacturers, ITC has grown from eleven subscriber-manufacturers to its present clientele of 33, embracing virtually all the important manufacturers in the industry.

The growth of ITC has been as slow as it has been modestly successful. Originally, it was our intention to release one new text typeface each month. In practice, however, only ten new text typeface families have been introduced in five years, a very modest addition to the existing library of typeface designs. The reason for this small number of typeface releases is testimony to the great amount of time and expense that ITC has encountered in developing and marketing each new typeface.

None of ITC's typefaces are protected under present laws. ITC has copyrighted its printed specimen literature and has trademarked the names of some of its typeface designs.

Contrary to Mr. Ebenstein's allegation on page 27 of his statement, in which he described ITC as "a cartel of manufacturers operating under the name of International Typeface Corporation (ITC)", subscribership to ITC *is* and *has always been* open to all film font manufacturers following ethical practices and was *not*, as Mr. Ebenstein claims, "set up by a group of manufacturers for their own exclusive advantage." (See Exhibits B and C) ITC has always solicited and welcomes new subscribers and is always in the process of doing so. It is *only* by obtaining the maximum number of subscribers that ITC realizes its greatest financial potential.

Mr. Ebenstein's client, Leonard Storch Enterprises, is an independent film font manufacturer, who on several occasions has approached ITC regarding subscribership.

Leonard Storch Enterprises has manufactured, by "duplication" methods (contact copying), film fonts that are sold for machines manufactured by the Alphatype Corporation of Skokie, Illinois. In addition, according to our knowledge, in recent months Leonard Storch Enterprises has released a typeface which was not contact copied from a font originally manufactured and previously released by the Alphatype Corporation.

In 1972 Mr. Storch requested a meeting to discuss the possibility of his firm becoming a subscriber to ITC. The meeting was held at which time the nature of ITC's structure was explained to Mr. Storch. Subscribership was offered to Mr. Storch at that time under the same conditions offered to all ITC subscribers.

Following this meeting a letter was received from Mr. Storch, (Exhibit D) in which he expressed his willingness to join ITC provided an agreement could be reached on terms and conditions which would be mutually beneficial.

At the meeting which had preceded this letter, Mr. Storch was informed that to be eligible for ITC subscribership he would have to be able to manufacture ITC products only from "artwork or drawings supplied by ITC". This is a requirement made of all subscribers to ITC's services and is part of the standard ITC/Reproducers agreement, Paragraph 3. (See Exhibit E.) This practice of making the ITC products from the artwork supplied by ITC insures the fidelity and quality of the final font and guarantees to the ultimate consumer that the fonts authored by the manufacturer are true.

ITC has only two requirements which it stipulates in its agreements with all subscribers: the one of orginal manufacture stated above, the other that license fees shall be paid to ITC for each film font or type product sold. The amounts of license fees are determined by film font classifications and are in no way discriminatory. ITC licensees select only those typefaces which they desire; there are no minimum requirements. All manufacturers whose products are in similar categories are required to pay the same license fee. (See Exhibit F—ITC New Royalty Structures)

Mr. Storch in a follow-up phone call to ITC, asked if ITC would object to a printed survey (Exhibit G) he wished to make amongst his customers concerning Leonard Storch Enterprises' possible membership in ITC. Although this was the first time this request had ever been made of ITC, we told Mr. Storch we would have no objection.

Since Mr. Storch's businesss at that time involved the manufacture of duplicated Alphatype film fonts and sold at prices far below those sold by the Alphatype Corporation, such a survey worded as it was, in our opinion, did not constitute a sincere effort to secure support amongst his customers for subscribership to ITC.

However, we did not express these sentiments at that time to Mr. Storch. We believed sincerely that, while Mr. Storch's methods were somewhat unorthodox, if he qualified and wished to become a subscriber he would be accepted.

Although Mr. Storch's ethical business practices were also questioned by ITC, opinion was sought by ITC at that time from two legal counsels and ITC was informed of the advisability of accepting Mr. Storch as an ITC subscriber, should he wish such subscribership.

Copies of these legal opinions, Exhibits H and I are submitted to acquaint the Committee with ITC's awareness and concern for possible violations of the Sherman and Clayton Acts, and that in the opinion of ITC's counsel, no action ever taken by ITC has been in violation of these Acts or in opposition to its counsel's guidance.

Accordingly, several months later, ITC contacted Mr. Storch, by phone, to follow up on his interest in ITC subscribership.

Mr. Storch informed ITC that he was no longer interested in subscribership since the overwhelming majority of responses to his survey had proved negative to his joining ITC. The matter was left open for Mr. Storch to join ITC in the future if he wished to do so.

Almost two years later, in April of 1974, Mr. Storch contacted Mr. Rondthaler, Chairman of ITC, to renew discussions concerning his company's subscribership in ITC.

At that time I was in the hospital recovering from a heart attack. Mr. Rondthaler informed me of Mr. Storch's request and in June of 1974 I called Mr. Storch to discuss the matter by phone.

Mr. Storch offered to visit me at my home, where I was recuperating. After five hours of friendly and what had seemed like satisfactory progress, Mr. Storch told me that his purpose for seeing me was not to join ITC, but to suggest that ITC and Leonard Storch Enterprises form a separate business together, and hoped that we could explore such avenues.

I was surprised and disappointed, and told Mr. Storch that had I known the real purpose of his visit, I would have spared us both the time and myself the unnecessary energy. That was the last time I spoke to Mr. Storch and I have not been contacted since by him concerning his subscribership in ITC.

In Mr. Ebenstein's statement on page 27, Mr. Storch claimed that "a $5,000 'contribution' was expected of him for subscribership in ITC. This fund to be used to change Copyright Law." This allegation is not only false, but also infers that a form of blackmail was used by ITC against Mr. Storch. ITC asks that our denial of this unjust accusation be brought to the attention of the House Committee and that it be made a part of the Record.

Furthermore, Mr. Ebenstein, on page 30 of his "paper", stated that his client, Leonard Storch Enterprises sought an opinion on the legality of ITC's activities from Anti-Trust counsel. This opinion, made by Weil, Gotshal & Manges, and dated June 11, 1974, states:

"DEAR MR. STORCH: Our understanding of the facts, *based on our meeting with you and the materials provided,* (italics ours regarding the background of the phototypesetting industry, Leonard Storch Enterprises, Inc ("Storch") and ITC are set forth below.

*   *   *   *   *   *   *

". . . In summary . . . to the extent that our understanding of the facts set forth above is *accurate*, membership in ITC could subject a member to serious potential liability and under current circumstances, should be avoided . . ." (italics ours)

ITC wishes to call to the attention of the Committee, that the "opinions" presented by Weil, Gotshal & Manges are based on limited information provided solely by Mr. Storch, and therefore should not be considered without a knowledge of the materials and information submitted by ITC with this letter.

For the purpose of clarifying some of the facts set forth in the Weil, Gotshal & Manges "opinion", we wish to submit the following remarks. A detailed response to the "opinion" will be submitted to the Justice Department in due course.

In the Weil, Gotshal & Manges opinion, on page 3 it is stated:

"We understand that such typographers have also been advised, either directly by ITC or indirectly by ITC subscribers and others in the industry, that Storch, or anyone making unauthorized use of fonts or faces offered by ITC or members of ITC, may be guilty of violations of law and could be subject to law suits, monetary judgments, and injunctions preventing them from using fonts unauthorized by ITC."

ITC has never made any such statements nor has it authorized anyone to do so in its behalf.

On page 4 of the Weil, Gotshal & Manges "opinion", only part of the contract provision pertaining to copyright attribution is stated and is misleading. The full statement is shown in Exhibit E, paragraph 7—"The Products of the Reproducer shall bear copyright attribution to the International Typeface Corporation. Attribution shall consist of the statement "Under license from International Typeface Corporation" and if ITC notifies the Reproducer that it has obtained copyright protection covering such products, the notice "C (year) International Typeface Corporation".

Reference is made in both Mr. Ebenstein's "statement" and the "opinion" by Weil, Gotshal & Manges to the typeface called Souvenir. The assertion has been made that this is an old typeface and has been merely "reintroduced" by ITC. In the Weil, Gotshal & Manges opinion, page 6, it is stated ". . . it is not a newly designed typeface."

ITC wishes to submit Exhibit J. (correspondence with American Type Founders, Inc., dated September 9, 1971) in which permission is granted to ITC by ATF to license Souvenir for release to ITC subscribers. In addition ITC pays to ATF a royalty on each font sold by the manufacturer of such fonts.

Souvenir had originally been created by ATF in only *one* weight and was designed in 1914. No italic version had been designed nor had any additional weights been created.

ITC commissioned the creation of four weights three of them new. complete with four new italics. A booklet showing all weights and attributing original ownership for Souvenir to ATF appears in Exhibits K and L. The Souvenir

family was issued by ITC in 1971 and has since become a widely popular and successful typeface design.

Leonard Storch Enterprises sells Alphatype contact copied film fonts of ITC Souvenir under the Storch brand name of "Jenny". Simply put, ITC contacted ATF, obtaining permission to use the name Souvenir and its basic letter form, then ITC drew three new Roman weights, plus four new italics, unitized them and offered them as new designs to all its ITC subscribers. ITC promoted the new designs. After they became successful Leonard Storch Enterprises simply photo contact-copied an Alphatype font and sold it under his name of "Jenny".

The Weil, Gotshal & Manges "opinion" makes reference to the ITC newspaper, "U&lc". The opinion states that "ITC controls the distribution of 'U&lc' and sells advertising space to ITC subscribers."

ITC wishes to state that 80,000 copies of the newspaper are printed and distributed free of charge. (Back issues are sold only in response to special purchase orders.) Subscription to U&lc is free to anyone who requests, by letter, to be placed on the U&lc mailing list and is not restricted as the word "controlled" might indicate.

Furthermore, advertising is sold to non-ITC subscribers as well as subscribers. (Exhibit M—First five issues of U&lc produced to date)

ITC has been active in attempting to prevent unauthorized production of typefaces. On page 7 of the Weil, Gotshal & Manges "opinion", the following statement appears: "We understand that the efforts outlined above are typical of the activities of ITC to prevent producers of fonts from being able to find customers for their products unless the producers agree to join ITC or to refrain from producing fonts bearing ITC created (or adopted) typefaces."

This statement alleges that ITC has attempted to restrain the sale of *all* typefaces produced by manufacturers other than those belonging to ITC. This statement is false and misleading and is without basis. We categorically deny the insinuations implied therein. Exhibits N, O, P, Q, R, S submitted as samples of efforts to discourage typeface plagiarism by ITC, The Association Typographique Internationale, and Klaus F. Schmidt.

Reference is made in the "opinion" to the Typeface Guild, a marketing concept which was created by ITC which was never consummated. Lack of customer interest in response to a survey conducted by ITC led to the cancellation of this project.

ITC finds no fault with the accuracy of the statements made by the other opponents, Advertising Typographers Association, International Typographic Composition Association or that of Alfred H. Wasserstrom, Esq.

The arguments presented by these groups were presented fairly and should be considered by the Committee together with all the evidence presented by the other witnesses who appeared at the hearings.

In conclusion, we should like to inform the Committee that the goal of ITC from the very beginning has been to demonstrate that it is possible to maintain a high ethical standard in the "typefounding" business.

In our effort to promote these ethical standards ITC has come to be regarded, by some, as a policeman. This is a great mistake. We cannot police for the entire industry, nor have we ever attempted to assume this position. The best we have tried to do is police ITC's alphabets and to develop ITC as a "showcase" for the industry.

The only means by which ITC has been able to gather support for these ethical standards has been to tell the facts . . . to give wide publicity—*in the absence of copyright registration*—to the name and legitimate source of each new ITC typeface design.

With this publicity, booklets and advertisements, ITC has been able to achieve widespread recognition for the true originators of its typefaces. This has created problems for the typeface copiers who have found it increasingly difficult to sell copied versions of original ITC typeface designs, to a public that is no longer uninformed.

ITC, as well as many others in the graphic arts industry, have used the freedom of the press to inform the public. It is this freedom of speech that the copiers of typefaces desire to still.

To demonstrate the various types of alphabets already in existence and the manner in which they can be classified, ITC submits Exhibt T.

ITC is in favor of full protection for designs of alphabets through copyrights. We would prefer registration under Title I but would accept Title II if alphabets could be protected for 15 years to be acceptable under World Copyright Agreement.

Copyright registration would merely establish presumed authorship.

Insofar as the mechanics of copyright registration is concerned, ITC believes that registration should be granted automatically to any persons swearing in the application form that they possess the original artwork and will keep it available for ten (10) years from the date of that application. No type of search would be necessary since it would be totally impossible for two persons to draw exactly the same alphabet. There would be differences regardless of what the original inspiration was used as a base.

Opponents of copyrights cite the fact that exclusivity granted to authors or designers of typefaces can create discriminatory practices. All the major equipment manufacturers stated publicly that they would license their copyrighted alphabets to qualified manufacturers, thereby providing universal availability.

Thank you for giving me the opportunity to make these comments. I respectfully request that this letter and all its material be presented to members of the Committee for their consideration and be made a part of the Record.

Very sincerely,

AARON BURNS,
President.

INTERNATIONAL TYPEFACE CORP.,
New York, N.Y., August 8, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, House of Representatives, Judiciary Committee, House of Representatives, Washington, D.C.

DEAR SIR: On July 28th I sent a letter to Mr. Herbert Fuchs outlining ITC's position concerning typeface copyright protection and answering numerous allegations made by Mr. Daniel Ebenstein, including those relative to anti-trust investigation, made in his presentation for Leonard Storch Enterprises. A copy of this letter is attached for your information, without the exhibits which accompanied it.

The heart of ITC's desire to obtain copyright protection for typeface designs is to eliminate the practice of unauthorized photo or contact copying of typeface fonts which deprives the originators of fonts of a fair return for their labor.

An original typeface font and a duplicate copy which was made by the contact copy process is enclosed herewith to demonstrate the ease with which the basic work product can be duplicated.

The cost to produce the first original master as shown here may be $10,000 or more. The cost to produce the contact copied version as shown would be approximately 25¢.

Also enclosed for your background information are a number of articles by diverse authors which have appeared in various publications. These articles provide background material which may be helpful for your consideration of the matter of typeface copyright protection.

I would be very pleased to provide you with any further information or materials which you might desire relative to this matter.

Very truly yours,

AARON BURNS, *President.*

Enclosure.

Mr. KASTENMEIER. Now I will call on Mr. George Abrams.

Mr. ABRAMS. Mr. Chairman, may I offer these alphabets and ads for the committee's examination?

Mr. Chairman, may I proceed?

Mr. KASTENMEIER. Please.

Mr. ABRAMS. Mr. Chairman, members of the committee, and counsel: My name is George Abrams. I am the president of Alphabets, Inc. My company produces new original alphabet designs and sets headlines and subheads using these faces. In addition, we offer over a thousand selective typefaces that are in the public domain.

As an artist whose entire lifetime has been devoted to the drawing and design of letterforms, I am grateful to you for the opportunity to present the position of hundreds of type designers like myself. Briefly,

I have created numerous original alphabet designs, some of which are present here for you to see. Because I work with and create for publishers, advertising agencies, printing companies, and other segments of the graphic communications industry, I am sensitive and responsive to the needs for new type styles.

Strange as it may seem, some tend to take typefaces for granted as if they emerged on the eighth day, forgetting that an artist can spend thousands of hours in drawing a complete alphabet. The production of an original alphabet of letters, quite apart from the considerable time spent in conceiving the form, requires utmost skill and may take as long as 6 months of drawing. The rendering and inking would occupy only several weeks of my time. Juxtaposing different letterforms with one another in order to insure confluent readability takes many months to complete.

At this hearing, I would like to show just five originals of alphabets I've designed presently in use for advertising clients as well as for Newsweek magazine who specifically commissioned an alphabet based on the masthead "Newsweek" which I had previously drawn. Also, I will show some examples of advertising, each of which has its heading in a typeface that came originally from my drawing table.

It is a fact that advertisers are constantly interested in the development of new typefaces in order to achieve a competitive advantage in marketing. However, because of lack of adequate protection under existing law, my skill is available to only a limited clientele.

I have presently a large number of new original designs which I would be pleased to offer type manufacturers. Under conditions that obtain today, I am reluctant to do so. The moment my alphabets appear in advertising they become public domain. Several of my original designs already have been copied, some debased, with no compensation to me except the fear that any time I come out with a new design someone would photocopy my efforts for his own market.

By copying, I mean actually photographing from my prints and reproductions without changing any aspect of letterform. And it is perfectly legal to do so under present copyright law. I must admit being discouraged and disappointed.

The printing equipment manufacturer finds himself in a similar position and I believe the public is being shortchanged and deprived of the artistry of typeface designers. The main incentive for the artist is the likely sale of his fonts through adequate royalty arrangements to foundries and equipment manufacturers for world market. With copyright protection my involvement would extend beyond the present limited number of companies I serve. I would devote all my time to the singular effort of creating new and exciting typefaces.

Fair compensation to an author for the fruits of his labor is an encouragement that our society has always recognized. With copyright for original typefaces assured, I foresee a new climate of incentive that will enhance the dignity of everyone concerned.

Thank you again for the opportunity to present my artwork and comments.

Mr. Kastenmeier. Thank you, Mr. Abrams.

[The prepared statement of Mr. Abrams follows:]

Statement of George Abrams, President, Alphabets, Inc.

Mr. Chairman, Members of the Committee, and Counsel: My name is George Abrams. I am the president of Alphabets Inc. My company produces new original alphabet designs and sets headlines and subheads using these faces. In addition, we offer over a thousand selective typefaces that are in the public domain.

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(Examples of original alphabets and ads to be offered to Committee for examination.)

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Thank you again for the opportunity to present my artwork and comments.

Mr. Kastenmeier. Mr. Parker.

Mr. Parker. My name is Mike Parker and at my left is our copyright counsel, Henry Leeds of Washington, D.C.

With your indulgence, Mr. Chairman——

Mr. Kastenmeier. Mr. Parker, may I interrupt you. I regret to do this, but we have a vote on the House floor, and rather than hope that you might finish while we are all still here, I think the better course of action is for us to recess at this moment, to return in about 10 minutes and reconvene at that time.

Mr. Parker. Thank you, Mr. Chairman.

Mr. Kastenmeier. We shall recess until 11:40 a.m.

[A brief recess was taken.]

Mr. Kastenmeier. The committee will reconvene. When we recessed at 11:30 a.m., we were about to hear from Mr. Mike Parker, director of typographic development for the Mergenthaler Linotype Co., and you were identifying your counsel at the time and about prepared to start your remarks, Mr. Parker.

Mr. Parker. Thank you, Mr. Chairman.

At my left is copyright counsel, Henry Leeds, of Washington, D.C.

Although I may not sound like it, I am an American. I am director of typographic development for the Mergenthaler Linotype Co.

With your indulgence, Mr. Chairman, I would appreciate a few moments to clarify what we are talking about today in protecting typefaces. I direct your attention to page 1 of the statement submitted by Mergenthaler to the Copyright Office in support of the registrability of claim of copyright in original typeface design. A copy of the statement is of record before you.

As stated then, the term "typeface" means a set of designs of (a) letters and alphabets as such, with their accessories such as accents, and punctuation signs, and (b) numerals and other figurative signs such as conventional signs, symbols, and scientific signs, which are intended to provide means for composing texts by any graphic technique.

A typeface is distinguished from other types of lettering in that it is used for setting a page of text. By necessity there must be carefully orchestrated, consistent repeating of design elements in the characters so as to produce a harmonious impression regardless of the combinations in which the specific characters are used.

To further illustrate typeface, you have before you a copy of a grid bearing a font of a typeface. In other words, a typeface is not a single letter but all of the letterforms and symbols necessary to compose a page of text. The design which clothes these letterforms and symbols is what we seek to protect.

Does that clearly say what it is? OK.

My work is to see that Mergenthaler typesetting equipment sets good type and is properly equipped with a broad range of typefaces to do so.

Have you tried, in a competitive commercial environment, to buy and sell an unprotected form of artistic endeavor?

I must decide on the worth to us of each new face knowing that we must:

1. Spend the money to adapt and produce it on our equipment, which usually exceeds $20,000.

2. Spend the money to promote it, which frequently exceeds $50,000.

Whereupon, if we are successful, all of our competitors are in a position to copy it without payment to the designer or ourselves.

This simple commercial difficulty inevitably chills efforts to create new typefaces in this country.

The manufacture and sale of type fonts by Mergenthaler and its approximately 40 competitors is a sizeable business. Mergenthaler alone produces and sells in the United States about $8 million in type fonts per year.

Ten years ago we needed approximately $200.000 and 2 years just to manufacture Linotype matrices for a typeface, exclusive of design and selling expenses. For today's photocomposition machines, the equivalent manufacturing time and expense would be approximately one-tenth to one-one-hundredth of that amount. The manufacturing and economic foundations of the industry have drastically altered, favoring and encouraging typographic development, a promise that, in the United States, has been largely frustrated by the lack of effective protection for the designers' and developers' efforts.

It has been erroneously argued by the opponents of protection of original typeface designs that protection would grant to some individual a proprietary right in the basic alphabet that we all share. Typefaces must not be confused with the bare bones of the letterforms themselves. A typeface is a set of coherent design principles worked out and applied to letterforms. We make no claim to the A, B, or C themselves, but only to the way in which we clothe them, or their Greek or Russian equivalents, with a consistent repetition of our own design elements.

It has also been argued that all characters, letters, and numerals of our language are essentially alike, that typefaces are too trivial to be worth protecting. If this is true, why is it necessary to copy the new artistic property of the designer rather than simply use the vast body of material in the public domain? There must be something of real value in each original typeface that differentiates it from the others and encourages it to be copied.

The opponents of protection for typeface designs argue that granting such protection will serve to raise prices and limit distribution. I can only say that this will not be true of Mergenthaler. We will license at a reasonable fee all protected faces, subject only to appropriate quality controls to maintain the integrity of the typeface design. Why? Commercially, because a typeface is most profitable when widely distributed on many manufacturers' equipment. For this reason alone, Mergenthaler would have no objection to compulsory licensing of protected typeface designs if Congress believes such a requirement to be appropriate.

Original typeface designs should also be covered under title II, the design protection bill. We would support such coverage if the present 10-year maximum term is extended to at least 15 years. As adviser to the U.S. delegation to the Diplomatic Conference held in Vienna in June of 1973 that established the Vienna Treaty for the Protection of Typefaces, I took part in the discussions that led to the establishment of 15 years as the absolute minimum period for the international protection of original typefaces, because of the length of time required to properly establish a new design. Anything less would be ineffective.

Mr. Kastenmeier. Mr. Parker, your time has expired.

I really have but one question and that is would you restate as succinctly as you can what it is that the bill H.R. 2223 should include in terms of statutory language for the purposes you seek?

Mr. Parker. Henry, should I ask you to answer that?

Mr. Leeds. Yes. I would like to answer that if I may, Mr. Chairman.

Mr. Kastenmeier. Yes.

Mr. Leeds. First, the definition of a useful article in title II, we would like to have it clearly indicated that typeface is to be considered

a useful article. As the bill is presently drafted, the fact that a useful article merely conveys information may preclude it from being a useful article. It is arguable that a letterform is intended for the purpose of conveying information. Also in section 202 of the design protection bill there are exclusions which Mr. Latman referred to earlier, the commonplace symbol or design. Our problem is that in typeface this carefully orchestrated repeating design is usually a composite of designs which have been used in other typefaces but never in the particular arrangement or format to make the new and original typeface design that we are seeking to protect.

So we would want to make it clear that in the case of typeface we are talking about a right which may include existing designs, but in a new arrangement.

Also I think that the design protection bill should be modified to limit the scope of protection which would be afforded to a typeface design. What we are seeking to protect is really the typeface as it is used as a means of composing text. We do not wish in any way to inhibit art directors, publishers, reprint houses, or authors, in having pages composed from typeface. Once on the printed page, it is of no concern to the designer. What is of concern is having the typeface put on the grid such as you have shown on that photocopy.

This is another type of grid. Here is another little grid of plastic. And it is the making of this means for composing a text for which we seek protection and it is only for this means.

Mr. KASTENMEIER. And only under title II?

Mr. LEEDS. No. We would like to have protection under title I also. We believe that title I does in fact, as it is now written, cover typeface designs, original typeface designs. However, there is a problem with section 113 and that problem is that it states that protection will be afforded only for those items for which there was protection as of December 31, 1976, either by statute or judicial decree. Well, there is no judicial decree in connection with typeface and there is no statute expressly permitting protectability for typeface unless you wanted to construe such protection under the design patent law. Accordingly, we think that section 113 should be clarified.

Then finally, coming back to the design protection bill a moment, we feel very strongly that 15 years is the absolute minimum for term of protection on typeface.

Mr. KASTENMEIER. Are you presently—under present law, are you presently attempting or presently obtaining protection under either the copyright law of 1909 as presently existing, or any other law? Are you—do you have protection presently?

Mr. LEEDS. Well, I have to give that a rather extended answer. I am sorry. The answer is, "Yes," we are seeking protection. We do in fact have an application pending to register the claim of copyright in an "Orion" typeface based on a grid as I am holding in my hand, this little plastic grid. However, the Copyright Office has deferred action on that application pending the outcome of the hearings which they held this past year.

Mr. KASTENMEIER. Have you successfully obtained protection under any present law for typeface?

Mr. LEEDS. No, we have not.

Mr. KASTENMEIER. OK.

Mr. PARKER. We find that design patent is essentially ineffectual for the purpose.

Mr. KASTENMEIER. Thank you. I yield to the gentleman from New York, Mr. Pattison.

Mr. PATTISON. I take it that you are asking for this 15-year protection, minimum period of 15-year protection which would be different than the protection as afforded by the bill under the design—not design patent but the copyright, title II. I mean this would be a specific 15-year protection for typeface, is that correct?

Mr. PARKER. Henry, how would you answer that?

Mr. LEEDS. Our position would be that in the case of all designs it should be for 15 years but in any event, if necessary, at least a specific provision for 15 years in the case of typeface. It is interesting that the original design bill submitted back in the 1950's provided for a 15-year term and after proponents said that is too long, it should be for only 5 years, the happy compromise was reached for 10. It is not very clear from the past hearings that I have read exactly how the 10 years were reached other than simply a Mexican standoff.

Mr. PATTISON. You have essentially a different problem, I take it, from somebody who designs a new clock face or something like that. The person who designs the new clock face or table lamp or whatever else is really not looking for a royalty kind of return probably but more like the unfair competition copyright or unfair competition protection from having other people using that, copying it. In your particular case you are really looking for a situation where you can establish more like the normal copyright where you will be getting royalties for your creation.

Mr. LEEDS. Yes; and I would like to expand on that a moment if I might. The basic problem we have is that the technology in the photocomposition field has been such that each manufacturer has his own equipment and there is no common compatibility of equipment. Therefore, it is absolutely essential in order and to have a popular typeface that you have two things. One, it has to be available on a widespread basis, and two, it has to be reasonably priced.

Now, in order to have widespread availability, the typeface has to be available to all manufacturers. This is why we indicated we would be perfectly willing to have compulsory licensing, because that is the only way you are going to get the typeface readily available to everybody and hopefully reasonably priced.

Mr. PATTISON. But you do agree with me that the basic protection that the design people are seeking is to prevent other people from using, from copying as opposed to the basic protection that an author is seeking which is to hope other people do copy, only pay for it. I mean there is a real difference.

Mr. LEEDS. I don't know. I would think the designer of a toaster would want some compensation if somebody else were to copy his design. He would certainly want to stop it, but I——

Mr. PATTISON. Stop it for sure.

Mr. LEEDS. And certainly it makes his negotiating position better with the company when he is negotiating for his payment of the design.

Mr. PATTISON. Well, the designer of a toaster, for example, isn't very likely to sell it to both General Electric and Westinghouse.

Mr. LEEDS. That is right. There is a difference.

Mr. DANIELSON [now presiding]. The gentleman's time has expired. The gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Danielson.

I would like to speak to the gentleman on the end who is an actual creator of new and original typeface designs. One of the other witnesses stated that there is a library of perhaps 10,000 designs now in the public domain. How are they cataloged so that you know when you are putting pen to paper that you are doing something new?

Mr. ABRAMS. Well, they come under generic terms—Caslon, Bodoni, Baskerville—various gothic forms. And it is easy to—I have a catalog with me if the Congressman would like to see it of alphabets, generically arranged in both historical as well as structural order. I will be glad to show it to him right now.

Mr. WIGGINS. I will tell you what my problem is and it is only because of lack of experience. This is your field and not mine. It is tough for me to imagine 10,000 different ways to make an A, but I take you at your word that there are 10,000 different ways.

Mr. ABRAMS. May I show you the book, sir?

Mr. WIGGINS. Yes.

Mr. ABRAMS. It will be but a moment.

Mr. WIGGINS. All right. You may take your seat.

Mr. PARKER. I have a comment that might clarify that.

Mr. WIGGINS. I think before you clarify it, let me ask the question and then you will know what I need to have clarified.

My whole concern here is how do you identify an original design and you only know if it is an original if you have some knowledge of what has been done heretofore. That requires a system of cataloging existing designs. And my initial question to you is, is such a catalog in existence so that you know when you put pen to paper that you are doing something different than that which has already been done?

Mr. ABRAMS. Yes. There are books that are available to any type designer, any typographer, showing various typefaces on the market today.

Mr. WIGGINS. Well, I will accept that and I verily believe it is true, but it almost boggles the mind, as I say, to imagine more than 10,000 ways of making an A.

Now, what we are talking about is the next 10,000, not the 10,000 which are in the public domain, for which you would like some protection for any novel and new way of designing a letter or an alphabet. And the protection you desire is the exclusive right to that design for a finite period and a compulsory license system, that is to say, that if someone wishes to copy it, a fee would be paid to the creator of it. Is that correct?

Mr. ABRAMS. Yes, sir.

Mr. WIGGINS. I don't recall in your testimony anything with respect to a fee schedule.

Mr. ABRAMS. No. I didn't discuss that at all.

Mr. WIGGINS. Do you have some thoughts on that?

Mr. ABRAMS. No. Not at this time, sir.

Mr. WIGGINS. Well, now, you told me, or someone told me, that there is at present existing voluntary licensing arrangements. What is now paid on a voluntary basis for the use of these original designs? Can anybody answer that?

Mr. PARKER. There are various royalty arrangements. Our most typical ones for an alphabet alone vary from 2 to 10 percent with 10 percent being the normal one.

Mr. WIGGINS. Of what figure?

Mr. PARKER. Of the sale price of the font to the user. There are no payments to us beyond that.

Mr. WIGGINS. You are using terms with which I am not really familiar, but if you can say the same thing in different words——

Mr. PARKER. Excuse me, sir. When we sell this font to whoever has the equipment to set type, there may be a royalty of 2 to 10 percent on the price of this item which typically varies from, $100 to $500, something like that. Ten percent of that is the amount of the royalty.

Mr. WIGGINS. And is it a one-time payment?

Mr. PARKER. One-time payment, that is right.

Mr. WIGGINS. Thereafter a person can produce the letters as many times as he wishes.

Mr. PARKER. Absolutely.

Mr. WIGGINS. Is that correct?

Mr. PARKER. Yes, sir. I would like further to add to that that where we buy alphabets for which there has been a great deal of promotion so that they are established and popular and the rest, we may pay more. We do in fact pay more to ITC where the royalty is on the order of 25 or 30 percent, something like that.

Mr. WIGGINS. Tell me something about this industry. I gather it is a definable industry. People are in the business of designing and producing typefaces. Are there four or five majors in this industry?

Mr. PARKER. That is essentially correct, and as many as 40 all told. Now, what I am defining by that is people who produce equipment that can be used to set words or text.

Mr. DANIELSON. The gentleman's time——

Mr. PARKER. And the font for them.

Mr. DANIELSON. The gentleman's time has expired. I recognize the gentleman from Massachusetts, Father Drinan.

Mr. DRINAN. Thank you, Mr. Chairman. I only have one question. You suggested that 12 nations of Western Europe have now adopted this treaty and I take it you are suggesting on page 2 as a result a disproportionate number of new designs originate in Europe. In the treaty that was subscribed by Great Britain, West Germany, France, and so forth, did that go through the legislatures of those countries?

Mr. PARKER. The first nation to ratify will probably be France this week. The others are working on it, but France should be the first. I know there are movements in all the others to put it through. None have refused it. France is in process of ratifying it.

Mr. DRINAN. You said it is now signed by 12 nations. I thought France had already signed.

Mr. PARKER. Signed, and then it must be put through the legislature and ratified. It is in process in all of them. We expect France to be the first to ratify it and make it firm. When five nations ratify it, it will go into effect.

Mr. DRINAN. Among which nations?

Mr. PARKER. Among those five and the others one by one as they adhere to it. The signatories are the principal industrial nations of Western Europe.

Mr. DRINAN. I can't figure out whether they are advanced or whether there is a better lobby for typefaces there. Tell me when this disproportionate number of new designs came from Europe. When did that start? When, since there is no copyright now, no protection—how did that happen?

Mr. PARKER. I believe that there are varying degrees of protection in European countries under their various different laws. It ranges from very strong in Italy to weak in some others. But essentially because in Europe typefaces are sold from country to country to country, it pays everybody to pay attention to this. Normally, European companies license each other. There is a real incentive for designing typefaces there and as far back as I can remember, more designs I believe have originated in Europe than here. And I think that goes right back to the beginning.

Mr. DRINAN. So it is really not due to copyright protection?

Mr. PARKER. Well, it is due to the protection which is available in Europe and the protection which is not available here, I do believe.

Mr. DRINAN. The protection that they all conspire to bring to each other, but not protection of law.

Mr. PARKER. It is protection of law in some of those countries, under patents mostly. England, I know, is proposing to protect under copyright.

Mr. DRINAN. Thank you very much, sir.

Mr. DANIELSON. I have only one observation and one question. In your statement, sir, and that of each of the other witnesses today, there has been some allusion or other to the fact that the Patent Office doesn't provide an adequate protection because there is such a huge backlog and it takes so long to get something processed through the Patent Office. There is at least a degree of truth in what you say there, is there not?

Mr. PARKER. Yes, sir.

Mr. DANIELSON. Perhaps our committee can look into the Patent Office next in order.

That is my observation. The question is this. With the differences I would think of as many typefaces, 10,000 in the public domain, are you able to state positively that there are no typefaces in the history of mankind that are not included in that booklet?

Mr. PARKER. Excuse me.

Mr. DANIELSON. We are going way back. We are going way back to the invention of written language now. Let's go back to the Greek Empire at least. Are there no depictions of the letter A in human history other than the ones in that book?

Mr. PARKER. I understand the question, sir. That is one catalog. You would need several to have everything.

Mr. DANIELSON. Are you able to state with conviction that every depiction of the letter A devised by the mind and hand of man is in one catalog or another?

Mr. PARKER. Yes, sir, but the problem is not the letter A. The problem is complete alphabets, A through Z, capitals, lower case, figures, punctuation, and the design system applied to them all. There might be two very different alphabets that had an identical letter A in common. You have to look at the complete assemblage and the design principles that those letters have in common.

Mr. DANIELSON. Suppose someone took two sets which are very similar and took half the letters from one and half from the other and thereby made a new font, would this be a violation under your concept of the law?

Mr. PARKER. I doubt that it would be a usable typeface.

Mr. DANIELSON. Well, suppose I just bullheadedly decide to use it. Now, then, where are you?

Mr. PARKER. Well, first of all, it would not be original, and second, it would not perform as a typeface. The thing that a typeface has in common is a set of design principles applied to each and every letter.

Mr. DANIELSON. A 50-50 set, half and half, then, would be a new type font actually.

Mr. PARKER. I don't think it would be a typeface, sir, under the definition.

Mr. DANIELSON. Thank you.

The last thing is where does de minimis set in? How big a variation do I have to make in this type font before it becomes a new product, a different product?

Mr. PARKER. Henry, what is the answer to that one?

Mr. LEEDS. I think the only answer can be that you would have to leave that to the court to decide what is or what is not the de minimis.

Mr. DANIELSON. You are getting down to a judgmental thing.

Mr. LEEDS. Exactly, and it would require experts, certainly not laymen like myself.

Mr. DANIELSON. Thank you, sir. My question was not frivolous, but it is usually not the pattern of Congress to pass laws which are unenforceable and there is a lot of meat to that question, and I have no more questions.

Mr. Wiggins.

Mr. WIGGINS. I will ask sort of a philosophical question of all of you. I have a nagging concern about providing exclusive rights to the language itself, to the very vehicle by which ideas are conveyed. And I think there is a conceptual difference between that idea and the ideas conveyed through the language. If we concede that the alphabet itself might have been subject to copyright protection back in history sometime, I am not so sure that societal values would have been enhanced by giving a monopoly to the means by which ideas are conveyed.

I have stated what bothers me, perhaps inarticulately, but hopefully you understand and will be able to comment.

Mr. PARKER. Yes, sir. I understand exactly. We have no claim on the letterforms themselves and perhaps I can use an analogy.

If I were to talk to another typographer and we were discussing, let us say, a typeface called Times Roman and I said we had designed a Times Greek or a Times Russian, although the design didn't yet exist, we, both of us, would know what it looked like because Times Roman is not necessarily an A, B, or C. It is a way of designing applied to an A, B, or a C or an alpha, beta to the Greek form or the Russian form, or indeed to nonsense forms, and if I took nonsense forms and designed them in the Times Roman manner according to the Times Roman design system, any competent typographer would recognize it as a member of the Times system, as Times nonsense characters.

If we had more time I could show these things as actually drawn, how this works. In fact, they are in the record that we have submitted

to you in the proposal—excuse me—in the statement that we submitted to the Copyright Office on the industry hearings. It shows these ideas, shows that a typeface is not the letters, but a treatment of letters, whether Roman, Greek, Russian, or abstract.

Is that answer to the——

Mr. Wiggins. Well, I think I understand your point of view and I don't have the answer to this problem that is just sort of nagging on me. Goodness knows, if a tomato can be a work of art for which people pay $20,000 or more, I don't see any reason why the letter A can't be a work of art and permit some ingenuity in its design, but the difference is that we communicate ideas through letters and that the whole theory of the Constitutional protection is to enhance communication of those ideas, and I just am a little skittish about giving somebody a lock upon the vehicle through which the ideas are communicated.

Mr. Parker. I don't think one could be considered to be given a lock on the vehicle when there are—I mean, if we accept the number 10,000, 10,000 alphabets, you know, that are at present free, open to all. It is only the design ideas that we are after and these are readily codified in a number of catalogs and books. In fact, I must say that the literature on this subject defining what alphabets exist and how they differ is far more available and voluminous, let us say, than music or writing or any of the other subjects protected by copyright. You will find there is far more material defining typefaces by the very nature than there are on any of the other copyright subject matters.

Mr. Danielson. I must apologize for interrupting, but we have come to the inevitable again. There is a vote on an appropriation bill. We are going to have to attend it.

Inasmuch as the hour is 12:20—my chairman didn't leave any instructions, but I am going to recess until 1:30 so that people will have an opportunity for lunch, and also we are switching to another set of witnesses. The group, Mr. Ebenstein, Mr. Dew and Mr. Wasserstrom will be called first as we reconvene.

We now stand in recess until 1:30 p.m. Thank you very much, gentlemen, for your help.

Mr. Parker. Thank you, sir.

[The subcommittee recessed at 12:25 p.m., to reconvene at 1:30 p.m.]

[The prepared statement of Michael Parker follows:]

Statement of Michael Parker, Director of Typographic Development, Mergenthaler Linotype Co.

Mr. Chairman, Members of the Committee, and Counsel, my name is Mike Parker and I am Director of Typographic Development for the Mergenthaler Linotype Company.

My work is to see that Mergenthaler typesetting equipment sets good type and is properly equipped with a broad range of typefaces to do so.

Have you ever tried, in a competitive commercial environment, to buy and sell an unprotected form of artistic endeavor?

I must decide on the worth to us of each new face knowing that we must:

1. Spend the money to adapt and produce it on our equipment (which usually exceeds $20,000)

2. Spend the money to promote it (which frequently exceeds $50,000) whereupon, if we are successful, all of our competitors are in a position to copy it without payment to the designer or ourselves.

This simple commercial difficulty inevitably chills efforts to create new typefaces in this country.

The manufacture and sale of type fonts by Mergenthaler and its approximately 40 competitors is a sizeable business. Mergenthaler alone produces and sells in the United States about $8 million in type fonts per year.

Ten years ago we needed approximately $200 thousand and two years just to manufacture Lintoype matrices for a typeface, exclusive of design and selling expenses. For today's photocomposition machines, the equivalent manufacturing time and expense would be approximately one tenth to one hundredth of that amount. The manufacturing and economic foundations of the industry have drastically altered, favoring and encouraging typographic development, a promise that, in the United States, has been largely frustrated by the lack of effective protection for the designers' and developers' efforts.

It has been erroneously argued by the opponents of protection of original typeface designs that protection would grant to some individual a proprietary right in the basic alphabet that we all share. Typefaces must not be confused with the bare bones of the letterforms themselves. A typeface is a set of coherent design principles worked out and applied to letterforms. We make no claim to the A B or C themselves, but only to the way in which we clothe them, or their Greek or Russian equivalents, with a consistent repetition of our own design elements.

It has also been argued that all characters, letters and numerals of our language are essentially alike, that typefaces are too trivial to be worth protecting. If this is true, why is it necessary to copy the new artistic property of the designer rather than simply use the vast body of material in the public domain? There must be something of real value in each original typeface that differentiates it from the others and encourages it to be copied.

The opponents of protection for typeface designs argue that granting such protection will serve to raise prices and limit distribution. I can only say that this will not be true of Mergenthaler. We will license at a reasonable fee all protected faces, subject only to appropriate quality controls to maintain the integrity of the typeface design. Why? Commercially, because a typeface is most profitable when widely distributed on many manufacturers' equipment. For this reason alone, Mergenthaler would have no objection to compulsory licensing of protected typeface designs if Congress believes such a requirement to be appropriate.

Original typeface designs should also be covered under Title II, the design protection bill. We would support such coverage if the present ten-year maximum term is extended to at least fifteen years. As advisor to the United States delegation to the Diplomatic Conference held in Vienna in June of 1973 that established the Vienna Treaty for the Protection of Typefaces, I took part in the discussions that led to the establishment of fifteen years as the absolute minimum period for the international protection of original typefaces, because of the length of time required to properly establish a new design. Anything less would be ineffective.

The language of Section 202 of Title II defining what is not subject to design protection should also be modified to make it clear that protection for original typeface designs will not be barred merely because the letterform itself is a familiar shape or because some or all of the individual design elements used to create the new typeface design are in common use or are variants commonly used in the trade, even though not in the particular combination for which protection is sought.

Mergenthaler urges that the industrial design protection bill be placed under the administration of the Copyright Office because:

1. It is a registration system modeled along copyright lines as opposed to the patent search system and,

2. The Copyright Office is not faced with the huge administration backlog of the Patent Office that causes long delays so damaging in this situation.

We support the granting of protection to original typeface designs under Title I and Title II not just so that the designer (or manufacturer) will get paid a few more dollars here or there. We support it in the end because we believe that the art of typography in this country stands to gain if the best designers are encouraged to do their best work in this field by Congress exercising its constitutional power to promote the useful arts by securing for limited times to authors the exclusive right to their writings—i.e., their intellectual creations.

In seeking protection for original typeface designs, Mergenthaler does not wish to inhibit in any way the use of the protected typeface by typesetters, publishers, reprint houses or authors. We merely want protection from the unauthorized reproduction of the typeface designs for the purpose of providing

a means to compose a page of text and the right to have such unauthorized means destroyed. This limitation would conform with Article 8 of the Vienna Treaty.

Finally, this past year, the Copyright Office held hearings on a proposed change in its regulations to permit the registration of the claim of copyright in original typeface designs under the present Copyright Law in 1909. We are submitting for your consideration copies of our printed statement and of Professor Nimmer's opinion filed with the Copyright Office; these detail the economics of the typographic industry, the legal aspects of protecting original typeface designs under both current law and the proposed Title I and Title II of the copyright law revision and the question of function and legibility in the alphabet versus the aesthetic ornamentation in original typeface designs.

Thank you for your attention.

[The material accompanying Mr. Parker's statement follows:]

STATEMENT IN SUPPORT OF THE COPYRIGHT REGISTRATION OF ORIGINAL TYPEFACE DESIGNS

To: The Honorable Barbara Ringer, Register of Copyrights.
From: Melville B. Nimmer.

The statement is made in response to the announcement of the Copyright Office relating to the possible amendment to § 202.1(a) of the Copyright Office Regulations relating to registration of original typeface designs. It is submitted on behalf of the Mergenthaler Linotype Company. I am professor of law at UCLA School of Law, 405 Hilgard Avenue, Los Angeles, California 90024 and am also a member of the law firm of Kaplan, Livingston, Goodwin, Berkowitz & Selvin, 450 North Roxbury Drive, Beverly Hills, California 90210. I am the author of the treatise *Nimmer on Copyright.*

In my opinion the aforesaid Regulations should be amended so as to provide for registration of original typeface designs. I shall not endeavor in this statement to analyze the somewhat fragmentary case law bearing upon this issue. That has been done adequately by others, including the Memorandum of E. Fulton Brylawski. It will suffice for the purpose of this statement to note that none of the reported cases construe the Copyright Act as precluding the proposed registration of original typeface designs. The analysis which follows will, then, be in terms of the text of the Copyright Act, and of the underlying principles pertaining thereto.

I. Original typeface designs are copyrightable under the copyright clause of the Constitution

There would appear to be no question but that original typeface designs constitute "writings" within the meaning of the Copyright Clause of the United States Constitution (Art. I, Sec. 8, cl. 8). "Writings" in the constitutional sense have been held to include sound recordings (*Goldstein* v. *California*, 412 U.S. 546 (1973)) and photographs (*Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53 (1884)), although neither of these easily fit the lay meaning of the term writings. It surely follows that typography, the very essence of what laymen understand as a form of writing, is also a "writing" within the meaning of the Copyright Clause. The Supreme Court in *Goldstein* has stated that "writings . . . include any physical rendering of the fruits of creative intellectual or aesthetic labor." Original typeface designs certainly constitute creative intellectual and aesthetic labor (see Par. III *infra.*).

II. Original typeface designs are copyrightable under the Copyright Act

A. ORIGINAL TYPEFACE DESIGNS CONSTITUTE "WRITINGS" UNDER SEC. 4 OF THE COPYRIGHT ACT

Sec. 4 of the Copyright Act provides: "The works for which copyright may be secured under this title shall include all the writings of an author". Although there is some debate as to whether the term "writings" in this context is coextensive with the same term as used in the Copyright Clause of the Constitution (see *Nimmer on Copyright*, Sec. 12), it is submitted that at the

very least "writings" under Sec. 4 must include all constitutional "writings" except insofar as other provisions of the Copyright Act dictate otherwise. This was the view expressed by Judge Learned Hand (*Capitol Records Inc.* v. *Mercury Records Corp.*, 221 F. 2d 657, 664 (2d Cir. 1955) (Hand, J. dissenting)), and has since been followed in other decisions. See e.g. *Harcourt, Brace & World, Inc.* v. *Graphic Controls Corp.*, 329 F.Supp. 517 (S.D.N.Y. 1971) (". . . the definition of 'writings' in Sec. 4 of the Copyright Act is intended to be read expansively, so long as limitations are not fixed elsewhere in the Act."). See also *Monogram Models, Inc.* v. *Industro Motive Corp.*, 448 F.2d. 284 (6th Cir. 1971), 492 F.2d 1281 (6th Cir. 1974). The *Monogram Models* decisions apply and give meaning to the clause at the end of Sec. 5, sometimes ignored in earlier decisions, that provides: "The above specifications (i.e. the Sec. 5 classifications) shall not be held to limit the subject matter of copyright as defined in section 4 of this title . . ."

Since original typeface designs are clearly "writings" in the constitutional sense (see Par. I supra), and since there is nothing in the Copyright Act which negates their inclusion under the statute, it follows that they are protected under Sec. 4. It therefore becomes unnecessary to determine whether typeface designs can qualify as "works of art" under a Section 5 classification.

B. ORIGINAL TYPEFACE DESIGNS MAY QUALIFY AS "WORKS OF ART" UNDER SEC. 5 OF THE COPYRIGHT ACT

Even it if were necessary to fall within one of the Sec. 5 classifications in order to qualify for copyright, original typeface designs may be found to constitute "Works of art" under Sec. 5(g). The Court of Appeals for the Sixth Circuit has made the point that "(t)he fact that these (Sec. 5) classifications are perhaps not accurate descriptions of the subject matter sought to be copyrighted apparently is of no consequence". *Monogram Models, Inc.* v. *Industro Motive Corp.*, 448 F.2d 284, 287 (6th Cir. 1971), 492 F.2d 1281, 1286 (6th Cir. 1974). Even if reliance is not to be placed upon the general Sec. 4 description of "writings", in applying the Sec. 5 classifications, these are to be expansively, not narrowly interpreted. But typeface designs, even under a restrictive interpretation, may surely qualify as works of art. The Copyright Office has inquired as to whether "type fonts as 'useful articles', can incorporate original design elements capable of being identified as 'works of art' within the scope of the present copyright statute."

In answering this inquiry we may start with the undoubted premise that any variation in the configuration of typefaces which departs from the standard alphabet is clearly a matter of "design." Moreover, such design variation in virtually all instances is undertaken for what is essentially an aesthetic purpose.

In the standard work in the field, *Legibility of Print* by Miles A. Tinker (Iowa University Press 1963), the point is made that with respect to typefaces in common use (including Scotch Roman, Garamond, Antique, Bodoni, Old Style, Caslon Old Style, Kabel Light, and Cheltenham) legibility or speed-of-reading do not vary significantly. (Ibid., p. 48). Where the typeface design varies in greater degree from the standard alphabet, there may be some significant effect on legibility, but such effect is to reduce, not increase legibility. This was the case with respect to American Typewriter and Cloister Black. (Ibid, p. 48). In any event, ". . . differences in typefaces would have to be very radical indeed in order to produce appreciable differences in legibility in everyday reading situations." (Ibid., p. 51). Tinker concludes that reader judgments as to legibility are in fact based upon "judgments of pleasingness." (Ibid., pp. 50, 64). It follows, then, that an election to vary typeface designs will virtually always be based upon aesthetic rather than utilitarian considerations. If typeface designs are to be protected by copyright, the reason a printer would elect to pay a royalty for the right to use such a design rather than employing one of the numerous public domain designs would be precisely because of the aesthetic effect of the copyrighted design. In this respect the situation is similar to that of *Ted Arnold, Ltd.* v. *Silvercraft Co.*, 259 F. Supp. 733 (S.D.N.Y. 1966) where the court held a pencil sharpener in the shape of an antique telephone to constitute a copyrightable work of art for the reason that customers would be willing to pay more for this article than for the ordinary pencil sharpener precisely because of its artistic design.

Finally, it is to be noted that the above discussion assumes that there is a viable distinction within the sphere of works of art between utilitarian and

aesthetic functions whereby protection is to be accorded only if the aesthetic functions "can be identified separately and are capable of existing independently as a work of art . . ." Copyright Office Regulations, § 202.10(c). Assuming that premise, original typeface designs should be accorded copyright registration for the reasons set forth above. But the premise itself is questionable. See discussion in *Nimmer on Copyright*, Sec. 37. The Supreme Court in *Mazer v. Stein*, 347 U.S. 201, 218 (1954) stated: "The dichotomy of protection for the aesthetic is *not* beauty and utility . . ." (emphasis added). Rather, insofar as a work contains artistic aspects, those may be protected under the law of copyright regardless of the utilitarian function to which those aspects may be put. Nothing in *Mazer* or in any other Supreme Court pronouncement, nor in the text of the Copyright Act, supports the "identified separately" and "existing independently" requirements of the Copyright Office Regulations. Even if this distinction is thought to be supportable with respect to other works of art, when a work of art is itself a writing in a literal sense, as in the case of typefaces, then the dichotomy between the artistic and the utilitarian loses all meaning. Such writings are by definition utilitarian in some degree. It would be an absurd paradox to conclude from this that writings, in their very core meaning, are excluded from copyright protection.

III. Typeface designs may incorporate the degree of originality and creativity necessary to support a copyright

It is clear, of course, that the copyright requirements of originality and creativity are of a most minimal nature. Any "distinguishable variation" of a prior work will constitute sufficient originality to support a copyright if such variation is the product of the author's independent efforts, and is more than merely trivial. *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951), and see cases collected in *Nimmer on Copyright*, Sec. 10.2. Likewise, the "required creativity for copyright is modest at best . . . (and may include that, which) is not what the phrase 'work of art' ordinarily calls to mind . . ." *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409 (2d Cir. 1970). See also *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F. 2d 279 (5th Cir. 1970) (". . . minimal degree of creativity required for copyright.") The leading case enunciating this principle remains *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), in which Mr. Justice Holmes opined: "It would be a most dangerous undertaking for persons trained only to the law to constitute themselves the final judges of the worth of pictorial illustrations. . . ."

It is hardly open to debate that typeface designs may embody not only the minimal originality and creativity necessary to support a copyright, but may, indeed, exemplify these elements in very marked degree. "The famous printer-designers, Fournier (1764), and later Bondoni (1818) have laid the main stress on the aesthetic qualities in book-making. The controversy between exponents of the Bauhaus style and the traditionalists in typography (Reiner 1946) was not simply a question of function: it was also one of aesthetics, and aesthetic tradition . . . Marderstein, like his American interpreter and confrere, Porter Garnett, does not admit expedience or compromise in the act of printing. Only excellence in aesthetic fulfillment is accepted." B. Zachrisson, *Legibility of Printed Text* (1965), p. 74.

IV. The issue of "Distinguishable Variation" is a matter for judicial rather than administrative determination

The Copyright Office has inquired: "Whether for purposes of copyright registration, workable standards can be established for distinguishing 'new' designs based on previously-existing typefaces from mere copies or minor variants of earlier designs."

It is submitted that no such standards need or should be adopted by the Copyright Office for the reason that they involve inquiries which are not proper for administrative determination. First, the fact that there are similar, or even identical "previously-existing typefaces" is irrelevant unless the further determination is made that the copyright claimant copied from such prior works. Copyright protection for typeface designs must, of course, be based upon a standard of originality, not novelty. Hence, the "prior art" per se is irrelevant in determining copyright protection. It is relevant on the issue of independent creation, but that presents a factual issue as to which the Copyright Office is neither equipped nor authorized to determine. When and if there is an attempt

to enforce a given typeface design copyright in a court of law, such court may well be required to determine whether and to what extent the plaintiff copied from prior typeface designs. That, however, is the kind of determination that the courts customarily make in copyright cases. There is no reason to believe that the courts will be less able to make such a determination in the case of typefaces than with respect to other copyrightable works.

Even if there is agreement as to the particular contribution to a previously existing typeface which has been made by the copyright claimant, whether such contribution constitutes a "distinguishable variation" so as to command copyright protection is a matter to be determined by the courts, not by the Copyright Office. The determination of whether a given typeface design constitutes a "distinguishable variation" from a prior design presents a factual question, and is a part of the general factual determination of originality. Originality always constitutes an issue of fact which may not be determined even by the courts as a matter of law. *Dezendorf v. Twentieth Century-Fox Film Corp.*, 99 F. 2d 850 (9th Cir. 1938). See also *Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc.*, 191 F. 2d 99 (2d Cir. 1951) and *Bleistein v. Donaldson Lithographing Co.* 188 U.S. 239 (1903). *A fortiori*, it is not a question which can be administratively determined by the Copyright Office.

V. The notice, deposit and registration requirements for typeface designs are the same as those applicable to other copyrightable works

"Assuming the potential copyrightability of certain typeface designs," the Copyright Office has inquired as to "the practical means of complying with the formal requirements of the copyright law as to notice, deposit, and registration." Since no amendment of the Copyright Act relating to typeface designs is contemplated, the notice, deposit and registration requirements applicable thereto may not vary from the same requirements as applicable to other forms of copyrightable works. This should present no appreciable difficulties. It is true that a copyright notice placed upon a given work may not indicate whether the claim of copyright relates only to the typeface designs contained in such work, to the underlying literary matter, or to both. But such an ambiguity always arises when a copyright notice is affixed to a derivative work. See *Nimmer on Copyright*, Sec. 89.3 and cases cited therein. For example, if copyright is claimed in a translation of an underlying work written in another language, the copyright notice affixed to the work in translation form need not inform the public whether the claim of copyright relates to the translation per se, to the underlying work, or to both. This, no doubt, is an inadequacy of the present Copyright Act, but it is not a problem that is peculiarly raised by copyright in typeface designs. That which is deposited and registered in the Copyright Office may consist of a book printed in the claimed typeface designs, with a notation in the registration certificate that copyright is claimed in the designs per se (See *Bouve v. Twentieth Century-Fox Film Corp.*, 122 F. 2d 51 (D.C. Cir. 1941); *King Features Syndicate, Inc. v. Bouve*, 48 U.S.P.Q. 237 (D.D.C. 1940)). Alternatively, there may be registration and deposit of the claimed typeface designs in alphabetical order, under Sec. 5(g).

CONCLUSION

For the above stated reasons, it is submitted that the Copyright Office Regulations should be amended so as to permit registration of original typeface designs. In this connection, it is surely not without significance that the international copyright community has come to recognize typeface designs as the propert subject of copyright, as exemplified in the Vienna Convention of 1973. Adoption of the proposed amendment would have the additional significance of announcing to the world that the United States is prepared to continue and expand its role as a responsible member of the international copyright community.

[Subsequent to the hearing, the subcommittee received the following letter:]

MERGENTHALER LINOTYPE CO.,
Plainview, N.Y., July 28, 1975.

HON. ROBERT KASTENMEIER,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, House Judiciary Committee, House of Representatives, Washington, D.C.

SIR: We wish to take this opportunity to reiterate and amplify the statements made on behalf of the Mergenthaler Linotype Company at the hearing of 17 July 1975 before your sub-committee on patents, trademarks and copyrights, as well

as to refute some of the arguments and inaccuracies made by the opponents of protection for original typeface designs.

On page 6 of our filed statement of 17 July 1975, we stated that, "In seeking protection for original typeface designs, Mergenthaler does not wish to inhibit in any way the use of the protected typeface by typesetters, publishers, reprint houses or authors." This statement is correct to the extent that Mergenthaler disclaims any rights in composed pages of text, irrespective of whether the means for making the pages were authorized or unauthorized. However, it is inaccurate to the extent that we seek protection from the unauthorized reproduction of original typeface designs for the purpose of providing a means to compose a page of text. Such protection would inhibit the typesetter's use of unauthorized means for composing text in a protected typeface design. Moreover, "art directors" were inadvertently omitted from the list of persons who should not be inhibited in any way if protection is granted for original typeface designs.

For the reasons expressed above, the aforementioned quotation from page 6 of our 17 July 1975 statement should be amended to read:

"In seeking protection for original typeface designs, Mergenthaler does not wish to inhibit in any way the use of the protected typeface by publishers, reprint houses, authors or art directors."

As stated at the hearings, Mergenthaler has no objection to compulsory licensing of protected typeface designs at a reasonable fee. Additionally, it does not seek unfettered protection for original typeface designs. It seeks only to protect original typeface designs:

1. from unauthorized use to make means for composing text, and
2. from such unauthorized means being used to compose a page of text.

We make no claim to the composed page, and would have no objection to expressly stating that text composed from an unauthorized means is not an infringement of the protected typeface design. These limitations and disclaimers provide a complete answer to the objections of the International Typographic Composition Association, The Advertising Typographers' Association, and Mr. Wasserstrom, Counsel for Hearst Corporation.

Referring to the written statement submitted by the International Typographic Composition Association (ITCA) and the Advertising Typographers' Association (ATA), the following quotations are particularly significant:

"* * * We are in favor of some form of protection for type designers that provides economic incentive to create and design good, unique, new and original typefaces, which are readily available to all at a competitive price." Page 2.

"We would prefer to see universal licensing of new designs so that independent manufacturers of type fonts could flourish. There is no reason economic or social why manufacturers of typesetting equipment should be the only source of type fonts for that equipment. Protection for the designer does not require insulation of the manufacturer from competition in a free market. In no way do we condone piracy and when we speak of independent font manufacturers it is with the understanding that they pay compensation to the designer." Page 5.

"'1. We would like to see universal licensing of typefaces to all legitimate manufacturers. We consider it healthy to have typefaces obtainable from more than one source, provided there is good quality control. Because typeface designs are unique, they must be meticulously and accurately reproduced. Their extension to matrices or grids (fonts) for equipment other than that for which they were originally designed is to be carefully controlled by the original designer or design team. Only with this kind of quality control, which insures compatibility, can designers specify type with the assurance that their finished designs will reflect their graphic plans.' and '4. AIGA wants to be certain that the cost of type composition remains reasonable—that a royalty and licensing system will not inflate rates unfairly; it also wants to be sure that any royalty or license charge will be collected only once, when the font or grid is sold . . .'

"In addition to the foregoing, the AIGA statement calls for specific legislation to prevent a copyright proprietor from gaining an injunction against an author, printer or publisher who used an unauthorized copy for a protected (type) face. This relates to the concern of the Hearst Corporation, as expressed by Mr. Wasserstrom, and of many other publishers." Page 11.

It is evident from the foregoing quotations that ITCA and ATA do not object to protecting original typeface designs. In fact, they urge it, subject to appropriate limitations with which Mergenthaler fully agrees.

The basic fear of Mr. Wasserstrom appears summarized at the bottom of page 10 of his statement to the effect that:

"* * * If you were to accord copyright to typeface designs of text matter, assuming originality of their ornamental features, there would be placed in the hands of copyright owners an opportunity to make egregious demands upon publishers. You would proliferate litigation because you would proliferate putative copyrights. Even if publishers were to succeed in the defense of such actions, they would still have the expense of defending the lawsuits for copyright infringement." Pages 10 and 11.

But Mr. Wasserstrom's fear is laid to rest if the protection for an original typeface design is limited to prohibiting its unauthorized use to make a means to compose text and to preventing the use of such means in composing text. Protection would not and should not extend to the composed text. An express statement could be put in the legislation to the effect that composed text set from an unauthorized means is not an infringement of the protected typeface design.

Turning to the scope of protection for original typeface designs, it is submitted that the protection should include:

1. The right to injunctive relief to prevent the unauthorized reproduction of the protected typeface design for the purpose of making the means for composing text.
2. The right to injunctive relief to prevent the setting of type from means bearing an unauthorized reproduction of a protected typeface design.
3. The right of destruction of unauthorized reproductions of a protected typeface design incorporated into means for composing text.
4. The right to an accounting to recover damages and profits (A) from whoever makes or sells unauthorized reproductions of a protected typeface design as part of a means for composing text, and (B) from the user of such means in composing text.
5. The right to recover treble damages, in the discretion of the court.
6. The right to recover attorneys' fees in the discretion of the court.

In Mr. Daniel Ebenstein's statement on behalf of Leonard Storch Enterprises, Inc., there are a number of mistakes sufficiently misleading to require correction. On page 25 of his statment, Mr. Ebenstein stated that there are perhaps twenty type designers in the world, and during the question period on his testimony he stated that there were only seventeen full-time type designers practicing in the world. In both his testimony (pages 25 and 26) and during the question period, he implied that these designers were largely on salary to major companies or otherwise controlled by them. At Mergenthaler, we have *no* salaried type designers. We pay a retainer to *one* free-lance type designer, Matthew Carter, in order to obtain from him right of first refusal on each of his new designs. For the bulk of our typefaces, we go to one or another of the several hundred practicing type designers available in this world today. Attached are pages listing nearly three hundred type designers from the 1970 edition of *The Encyclopedia of Typefaces,* at best a partial list. Mr. Ebenstein's picture of a small group of twenty or less individuals all committed to major manufacturers in no way fits the facts.

On page 28 of his statement, Mr. Ebenstein states that "a Mergenthaler font for an ITC face on which Mergenthaler paid a royalty of approximately $200 per font, sold for $331 rather than the usual $131." This statement is false. Since 1 January 1975, Mergenthaler has charged $200 each for V-I-P fonts for ITC faces, of which $60 has been paid to ITC to defray their developmental and promotional expenses.

On page 22, Mr. Ebenstein estimates the cost of producing a $65 Alphatype font and then notes that "other manufacturers' fonts are even more expensive, for an example, $131 for a Mergenthaler font." Aside from the fact that the $131 price is outdated, it should be noted that traditional hot metal fonts and Alphatype fonts produce one size of two typefaces, while the Mergenthaler font produces up to twenty sizes of a single typeface. In other words, approximately *ten* times the number of Alphatype fonts or traditional hot metal fonts are needed to produce the type that is obtained from a *single* Mergenthaler film strip that costs very little more than *twice* as much. This would seem to be a fair bargain, particularly when it is compared with the old price of approximately $500 for a single size of a pair of typefaces in hot metal and when one realizes that the promotional expenses that used to be defrayed against a series of fonts are now carried by this single font.

On pages 27 through 31, Mr. Ebenstein paints a picture of International Typeface Corporation (ITC) as a large and dangerous cartel. ITC is, in fact, a part-time activity of three gifted individuals, each of whom is otherwise employed

full-time. If the part-time activities of this small group threaten the typesetters of Amerca, it demonstrates the sad state of development of new typefaces in this country. Contrary to any implication, ITC has only developed 10 text series over its five year history. The simple fact is that more typefaces for text were not created because of the lack of effective protection to justify the effort and expense of a new typeface design.

On page 5 of Mr. Ebenstein's statement, he says that, "the recognized authors in the field (including Nimmer in his work on Copyright) agree that ordinary typography, which in our terms would include typeface design, is not copyrightable under the present Act." The Committee's attention is directed to the opinion of Professor Nimmer which accompanied Mergenthaler's 17 July 1975 statement filed with your Sub-Committee. The opinion was initially submitted to the Copyright Office on 15 January 1975 and since then has been of public record. It is clear that Professor Nimmer wholly supports protection for original typeface designs under the existing copyright law and presumably would be in favor of such protection under Titles I and II of H.R. 2223.

Both the ITCA statement and the Ebenstein statement emphasize the utilitarian aspect of typefaces and emphasize that typefaces grow out of essentially an effort toward legibility alone. If this were true, we could expect to find a single most legible typeface in general use, rather than the very large number of alternative typefaces in use today. Even a casual study of the history of typography shows that typefaces have always been created for aesthetic and stylistic reasons. Frequently new designs are criticized as being illegible for one reason or another. The Roman letterform of today was so criticized before it replaced the earlier Black Letter, which is now illegible to all but a few scholars. In short, legibility follows as the vast body of readers accepts the forms as pleasant, appropriate and delightful. This cycle has been repeated almost without end since the first crude signs were produced, resulting in the wide variety of alphabets seen in the world today—Sanskrits, Cyrillics, Greeks, Hebrews, Romans, Black Letters, etc. There are, in the end, no differences between one typeface and another than aesthetic differences. Somewhere, some time, a designer drew the forms and shaped them that way for aesthetic reasons. Legibility followed when the world accepted those forms. This development continues today, and would continue to the greater good of the public should proper protection encourage the best work by the best minds in the field.

On pages 14 through 16, Mr. Ebenstein outlines some of the functional requirements of various kinds of typefaces—and implies that these somehow prohibit anything but functionality. In reality, those conditions are merely the limitations within which type designers pursue their aesthetic quest. Restated, they do not dictate *how* the design is to be drawn, but rather the limitations *within* which it must be drawn.

On page 6 of this statement, Mr. Ebenstein refers to a news article in the February 1975 issue of *Art Direction* magazine which allegedly quotes supporters of copyright protection for typeface designs as wanting royalties of 2% to 3% of typesetting fees. In the case of text typefaces, neither Mergenthaler nor any other manufacturer has ever requested more than a royalty on the sale of the font to the user.

On page 23 of his statement, Mr. Ebenstein notes "interestingly, when Leonard Storch Enterprises introduced its first entirely new typeface (OLIVETTE) in fonts for the Alphatype machine and began advertising and promoting the new face, Alphatype Corporation quickly copied the face (under the name OLIVANTE)." As the names Olivette and Olivante would indicate, this "entirely new typeface" is to any typographer a copy of the French design "Antique Olive", created by Roger Excoffon for Fonderie Olive in 1963. Mr. Storch considers this his first "entirely new typeface" because it is the first design that was not contact photo-copied from existing Alphatype fonts. Since Alphatype had not produced "Antique Olive", Mr. Storch had to copy the images of the letters and assemble them himself into the array required for an Alphatype font. This scarcely qualified Olivette as an "entirely new typeface".

Mr. Ebenstein goes on to say that "copying typefaces is a necessary part of the typography business." Mr. Ebenstein is attempting to equate copying with wide distribution. It is not necessary to contact photocopy another's typeface without permission to achieve widespread distribution. It is only necessary that there be widespread availability of a particular typeface for all photocomposition equipment.

To further clarify the record, the principal business of Storch Enterprises has been contact photocopying the photographic fonts of the Alphatype Corporation, and mounting them to fit the machines of Alphatype, with the exception of OLIVETTE and possibly a few others unknown to us. Restated, with limited exceptions, Storch Enterprises does not do its own original art work, but rather obtains its art work by photocopying the Alphatype fonts. On this point, Mergenthaler does not object to fair competition by independent font manufacturers. It does object to the unauthorized and unfair contact photocopying of its typeface font by a competitor.

While there are many other inaccuracies in Mr. Ebenstein's written and oral presentations, they are generally irrelevant and immaterial and not germane to your Committee's considerations.

In summary, the principal objections to protecting original typeface designs are fully met by Mergenthaler's willingness to accept compulsory licensing of protected typeface designs at a reasonable fee and to limit protection for original typeface designs to their use in making means for composing text and to the use of such means in composing a page of text. With these limitations and conditions, there really are no substantive reasons for not protecting the creative and intellectual efforts of the typeface designer. On the contrary, such protection would truly promote the useful arts by giving the necessary incentive to the designer to create original typeface designs.

Respectfully submitted,

MICHAEL PARKER,
Director, Typographical Development.

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Statement of Mergenthaler Linotype Company
in Support of the Registerability of the
Claim of Copyright in Original Typeface Design

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Statement on Behalf of Mergenthaler Linotype Company

Introduction

The Mergenthaler Linotype Company, Plainview, New York, a division of Eltra Corporation, submits this statement in support of the registration of the claim of copyright in original typeface designs, pursuant to the notices appearing in the September 10, 1974 and November 18, 1974 *Federal Registers.*

As used herein, the term "typeface" shall mean sets of designs of (a) letters and alphabets as such with their accessories such as accents and punctuation marks, and (b) numerals and other figurative signs such as conventional signs, symbols and scientific signs, which are intended to provide means for composing texts by any graphic technique.[1]

Typeface is distinguished from other types of lettering in that it is used for setting a page of type. By necessity, there must be a consistent repeating of design elements in the characters so as to produce a harmonious impression, regardless of the combinations in which the specific characters are used.

The terms typeface and type font are sometimes used interchangeably. However, there is a difference. The type font is merely the assortment of a typeface in a particular size or style for a particular purpose. In any given font, there are usually seventy to ninety or more characters.

To give the Copyright Office the fullest exposure to the question of copyrighting typeface, this statement will first overview the typographic industry and the economics of typeface production today and in the past, which will demonstrate the urgent need for protection.

It will be followed by a detailed analysis of the Constitution, the Statute, and the case law relating to the copyright of original typeface designs. Similarly, the legal arguments raised against copyrighting typeface will be analyzed and refuted.

The statement will then treat the enduring life of typeface, its legibility, and the "originality" in its design. It will also refute in detail the written statement submitted to the Copyright Office by Dan X. Solo on November 6, 1974, entitled "An Argument in Opposition to Copyright Protection of Printing Types."

Thereafter, it will discuss the applicability of the pending general Copyright Revision Bill (S.1361) and of Title III thereof entitled "Protection of Ornamental Designs of Useful Articles" to the protection of original typeface designs. Finally, the statement will specifically respond to the five questions raised by the Copyright Office in the notice published in the September 10, 1974 *Federal Register.*

I. An Overview of the Typographic Industry

Today there are three (3) broad classes of type setting equipment. The first is traditional handset type. The second involves typefaces set in metal by machines such as the Linotype, Monotype, Ludlow or Intertype machines. These machines use brass matrices bearing the typeface from which lead slugs are cast. The lead slugs in turn are used for the purpose of printing the pages. This process of printing from lead slugs has been commonly referred to as "hot metal."

The third and more modern type setting equipment may be broadly characterized as photocomposition equipment which uses a typeface appearing on a grid made of plastic film, glass or other materials. From the single grid bearing the full typeface, the machine is able to produce by various methods of photoreproduction of a page of text. The photoreproduction, in turn, is used to make the plate for printing. This process is commonly referred to as "cold type."

The typographic industry may conveniently be broken into four (4) different categories.

At the top is the designer of the typeface who may be an independent designer or who may be employed by the second level which constitutes the manufacturers of type setting equipment. The manufacturers in turn can be sub-classified into those who manufacture their own photocomposition equipment and grids bearing the typeface of the designers or just those who manufacture grids only.

At the third level is the type setter who purchases the type setting equipment including the photocomposition equipment and the grids bearing the typeface. This is the person who composes the text that will be used in printing the final page.

At the fourth level, are the printers, publishers, and art directors who buy the product of the type setter. Of course, there are many overlappings between type setters and printers and publishers. For example, newspapers and publishing houses often own their own type setting equipment and their own printing equipment.

It has been said that there are more than 10,000 and less than 100,000 type faces in the public domain which are currently available for use in this country. Mergenthaler itself has more than 600 typefaces in its library which are in the public domain. Every one of these typefaces is

utilitarian in that it is legible. Any one of them would do for the purpose of producing a printed page.

It should be readily apparent from the mere fact that Mergenthaler has more than 600 typefaces in its own library which are in the public domain and all of which are legible, that the only distinguishing feature between one typeface and another is the artistic design inherent in a particular face. But if there is any question that one typeface may have a more pleasing design than another, it is laid to rest by the fact that today a designer's typeface is copied by others as soon as a commercial market is established. If, as some people say, all characters, letters and numerals of our language are more or less alike, why is it necessary to steal the new artistic property of the designer rather than simply using the typeface in the public domain? If all alphabets really look the same, no firm would invest good dollars in a design of which there have been equivalents in their own catalogs for years. There must be something in the design of a typeface that encourages it to be copied with impunity.

As a practical matter, there currently is little protection for original typeface designs under the patent or copyright laws.[2] The result has been a field day for copying every new typeface introduced, thereby reducing the incentive for creating them. This is not to say that new typefaces are not being designed. They are. But with the photocomposition equipment now available, the opportunity for new typefaces is unlimited. No longer is the designer restricted to what the manufacturer can afford to reproduce in metal. The use of the photographic film plate and the extraordinarily high quality of many of the photocomposition machines has opened up new vistas for designers. Unfortunately, these vistas are only being exploited to a fraction of their potential and the reason is simple—why should a designer or a manufacturer invest time, money and effort in creating something new from which he can get little or no commercial benefit since the typeface will be immediately copied by a competitor as soon as the market for typeface is established?

The present day copying also creates another problem which is a common complaint of the typesetter—to wit, the poor quality of the letter forms themselves. Unless there is copyright protection for typeface, there is no way in which the quality of the letter forms can be controlled.

Without belaboring the matter, copying has always

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been a problem for the designer and manufacturer of typefaces. But with the advent of the photocomposition equipment in the 1960's the problem has become most acute. Photocomposition equipment in the type setting field is tantamount to a second industrial revolution. The capability of higher quality, higher speed and less expense is realized by these wonderful machines and the typefaces available for them are 10 to 100 times cheaper than they were for the hot metal machines. This factor alone permits the typesetter to have a broader scope of typefaces available, which consequently produces a greater market for typeface grids and, regrettably, encourages the copying of new typefaces by competitors.

II. The Economics of Typeface Production of Photocomposition Versus "Hot Metal"

Until the 1880's and the invention of the hot metal composing machines, typefaces were relatively cheap to manufacture and relatively easy to copy. Typeface plagiarism was therefore common from Gutenberg's day until the end of the nineteenth century when the invention of the Linotype and the Monotype and the Ludlow called for factory manufacture of typefaces in a more complex form. To properly make typefaces for these complex mechanisms, an expenditure of some millions was necessary to set up the factory—and anywhere from $100,000 to $500,000 to put out a complete series of sizes, weights and sometimes widths of a typeface. This expense was required for the drawings which had to be made, patterns and punches cut, and the plurality of matrices made for each font size e.g., roman with italic, roman with bold, etc. Whoever got there first got the cream of the market. Therefore, the large expenditure for a second comer to produce a copy and then try to catch up was economically unattractive—thus reducing the typeface plagiarism during the "hot metal" process period.

The situation radically changed with the introduction of photocomposition machines in the 1960's. Instead of the many fonts of brass matrices which had to be manufactured and put on the shelf, it is now necessary to have only a single film strip from which many varying sizes can be produced. This reduces manufacturing costs to one-tenth to one-hundredth the amount required for the hot metal composing machine fonts.

Every manufacturer today to compete must offer a full range of typefaces—and the cheap, economical and obvious way to do that is to copy the competition's faces as rapidly and economically as possible, changing only the name where necessary to guard against possible trademark infringement. Even if a manufacturer has to redraw the letters in order to adapt them to his machine and then remanufacture a different kind of font, the cost of doing it is cheap enough so that typeface plagiarism has become rampant throughout the industry.

In certain cases, unscrupulous manufacturers have gone one step further and actually buy up, borrow or otherwise obtain grids bearing fonts for a particular machine or system, photographically contact copy it, and from that contact copy, make font grids for sale at a

fraction of the price of the original. Even at his reduced price, the copier's profits are actually greater than the profits made by the original manufacturer, who must pay for all the equipment and work that went into the original master by the sale of a number of his font grids. By contrast, the copier has to pay only for a simple vacuum frame, the materials for copying and whatever other general overhead he may have. His costs are only a few cents or dollars per font grid against the original manufacturer's tens or hundreds of dollars.

The relatively recent change in the economic status of the industry makes possible a whole new structure of typefaces. Under the old "hot metal" system, the manufacturer had to envision a market for each new typeface that was broad—probably including many different uses for the face—and those uses to last over a number of years—if the face was to be properly paid for and profits to be made. This led to a few select, general-purpose designs, none of them too close to each other. The high price of the resulting fonts led the purchaser to be wary in buying new faces—because in the case of the Linotype his normal investment in a new series would be over $10,000. It was, therefore, uncommon for a typesetter to have more than a few general purpose faces in stock.

By contrast, in photocompostion, one can afford to manufacture fonts for a specific segment of the industry, even if the fashion is an extreme one, limited to one segment of the industry whose duration may only be a matter of a few months, or a year of two. The low cost of manufacture encourages the manufacturer to take the risk of bringing out the new typeface. Similarly, it encourages the purchaser to buy the new typeface font since he can recover the cost of the fonts quickly. There is a new market for new designs of really quite a new kind—if only the designers are there to supply it. Unfortunately, those who enter the field today tend to get paid a few dollars in royalties from one manufacturer while all the rest copy the design if it has any merit or value, with no payment to the originator whatsoever. The opportunity for new designs is not and will not be fully realized under these conditions.

Comparing the old "hot metal" composing machine system with the new photocomposition system, the cost of design drawings is essentially the same, but the cost of

manufacture (which was the overwhelming expense under the old system) has been reduced to between one to ten percent of the "hot metal" system, while the cost of marketing remains essentially unchanged. In Mergenthaler's case, it produced in the past only the typefaces that it could afford to manufacture. Today, it produces the typefaces that it can afford to market.

III. The Constitutional, Statutory and Legal Aspects of Registering the Claim of Copyright in Original Typeface Designs

A. Constitutionality

Any study to determine the copyrightability of a work or article might reasonably commence with the applicable language of Article 1, Section 8 of the U.S. Constitution, to wit:

"The Congress shall have the power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."

The word "writings" in the Constitution has been interpreted to mean something much more than the word implies in the ordinary sense. As stated in *Harper and Bros. v. Kalem Co.,* 169 Fed. 61, 64 (2nd Cir., 1909) aff'd 222 U.S. 55, "the history of the Copyright Law does not justify . . . a narrow constructuion of the word 'writings'." This court continued by saying that Congress had construed "writings" to cover various forms of expression including maps, charts, engravings, prints, paintings and statuettes and that this action had been acquiesced in over fifty years, so that writings should be broadly construed by the courts.

In the first definitive statement of the meaning of "writings," the Supreme Court in the *Trademark Cases,* 100 U.S. 82 (1879) stated at page 94:

"And while the word writings may be liberally construed, as it has been, to include original designs for engraving, prints, etc., it is only such as are original, and are found in the creative powers of the mind. The writings, which are to be protected, are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like."

In *Burrow-Giles Lithographing Co. v. Sarony,* 111 U.S. 58 (1884), the Supreme Court further indicated the broadness of the meaning of "writings" in its statement:

"By writings in that clause is meant the literary production of those authors and Congress very properly has declared these to include all forms of writings, printing, engraving, etching, etc. by which the ideas in the mind of the author are given visible expression."

The meaning of the constitutional clause relative to copyrightable "writings" is well summarized in Study No. 3 prepared for the Subcommittee on Patents, Trademark and Copyrights, 86 Cong. 2nd Sess. at page 85:

"On the basis of these two cases (*Burrows-Giles* and *Bleistein*), other courts have similarly defined these words (writings of an author) in terms of principles and standards, such as: 'the expression of an idea, or thought, or conception' of the one who takes the photograph; subjects which 'convey or are capable of conveying the thought of an author'; 'creative, intellectual or aesthetic labor in the production of a concrete, tangible form' resulting in an artistic creation; result and 'fruits of intellectual labor'; and 'labor of the brain in these useful departments of life'."

Hence, typeface designs, in the words of this study, are clearly "creative . . . productions of a concrete, tangible form" or "ideas in the mind of the author (which) are given visible expression" and, hence, are "writings." Nothing better promotes the progress of the "useful arts" in the sense of Article 1, Section 8 of the Constitution than the creation of pleasing, readable and decorative typefaces.

B. Statutory Background

Original typeface designs not only are copyrightable "writings" in the constitutional sense but are specifically copyrightable "works of art" under the statute. "Art" in this sense is defined by Webster's Third International Dictionary, 1966 edition, as the "application of knowledge or skill in effecting a desired result." Long prior to the advent of printing, handwriting was one of the earliest and most important forms of art practiced by monks and scribes, not only to promote the dissemination of knowledge and learning, but also to provide a beauty and esthetic appeal for that which has been written. Today, few attempt to match the grace and beauty of this old art form and we are thus limited to admiring and studying this artistic expression in terms of the ancient and illuminated manuscripts in which it appears. No authority has denied that these ancient writings are not works of art; rather there is a contrary tendency to acknowledge that even unskilled handwriting is a creative work and perhaps even copyrightable as a work of art. For instance, Justice Holmes implied as much

in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903):

"Others are free to copy the original. They are not free to copy the copy. (citations omitted). The copy is the personal reaction of an individual upon nature. Personality always contains something unique. *It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible which is one man's alone. That something he may copyright unless there is a restriction in the words of the Act.*" (italics added).

Handwriting as an art form today has been replaced by the more difficult and precise form of art in the designing of typefaces, which is much more complicated and involves considerable more creativity, skill and effort even than the preparation of stylized or beautiful handwriting. The difference between the look of one type and the look of another is the difference between thousands of tiny repeating details that have been carefully orchestrated or arranged and combined by the typeface designer. These typeface designs involve a considerable amount of talent and creative product not only to create a pleasing and effective design of a single letter of type, but also to provide a consistent pattern of design which will enable the various letters to be fitted together in all of the hundreds of thousands of permutations and combinations of twenty-six lower case letters, twenty-six capital letters as well as all of the additional symbols, punctuation marks and numbers necessary to complete the family of print. Any doubt that these original typeface designs meet the standards of copyrightability as works of art seems to have been long ago set to rest in *Bleistein v. Donaldson Lithographing Co., supra,* wherein the court stated:

"Yet if they (works of art) command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt."

Undeniably, these typeface designs have considerable commercial value, illustrated not only by the willingness of their designers to expend as much as $100,000 in the preparation of a new typeface design, but also by the fact that such typeface designs are copied and imitated as

soon as they have been published. Otherwise, it would not be necessary or desirable for others to copy a new typeface design rather than simply to use one of the thousands of existing typeface designs already in the public domain. That the invividual typeface designs may not necessarily have the same visual impact as a painting or other form of fine art makes no difference, though certainly the pleasing effect of a composition of type may provide its own kind of beauty. In *Mazer v. Stein,* 347 U.S. 201 (1954) the court said in this regard:

"Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art. As a standard we can hardly do better than the words of the present regulation, Sec. 202.8 *supra,* naming the things that appertain to the arts. They must be original, that is, the author's tangible expression of his ideas."

In addition, there is no statutory obstacle to the copyrightabality of an original typeface design as a work of art. Section 4 of Title 17 U.S. Code provides:

"That the works for which copyright may be secured under this section shall include all the writings of an author."

Arthur W. Weil in his book "American Copyright Law" (1917) felt that the foregoing statutory expression exhausted the constitutional power of what was copyrightable, stating at page 181 of his treatise:

"Congress has, by using the very words which are used in the section of the Constitution from which it drew the power to pass this Act, shown its intention to exercise that power with respect to all matter in which it could allow copyright constitutionally. It must, therefore, be deemed that everything is copyrightable under the present Act which could, constitutionally, be made copyrightable."

While some textwriters may not feel that the present statute exhausts the legislative power under the Consitution, there seems to be general agreement that all "writings" of an author which are visually perceivable are copyrightable under the present statute and Weil's interpretation in this regard at page 189 of his text seems applicable and generally respected:

"The subject matter of United States copyright at the present time, then, is all 'writings' by which are meant each and every visual expression of the ideas of an author, embodied in any tangible medium, or combination of media, whatsoever, whether on, or in, paper, canvas, marble, bronze, stone, metal, textiles, ivory or any other substance."

Clearly, a typeface design, initially prepared on paper and subsequently embodied in a plastic or glass grid and eventually in print, logically and reasonably meets Weil's statutory test of copyrightabality. Such designs, if nothing else, are visual expressions of the ideas of their creator and, hence, copyrightable writings under the present statute.

In addition, there is nothing in the present statutory class of "works of art," expressly recognized in §5(g) of Title 17 USC, which would preclude original typeface designs from the status of copyrightabality. Even if this were not the case, §5 otherwise provides for copyright in typeface designs in the catch-all language at the end of this Section:

"The above specifications shall not be held to limit the subject-matter of copyrights as designed in Section 4 of this Act."

The Committee report attending the enactment of the Copyright Act of 1909 (HR 2222, 60th Cong. 2d Sess.) states that "Section 5 refers solely to a classification made for the convenience of the Copyright Office and those applying for copyrights," which rather clearly implies that the classes specifically listed are not deemed to be exclusive, with a result that even if typeface designs were not copyrightable in the class of "works of art," they still would be copyrightable under the catch-all or proviso language at the end of Section 5.

The legislative history of the present statute, the Act of 1909, as amended, codified in Title 17 USC, indicates that "works of art" as a copyrightable class in Section 5 should be construed broadly. Under the earlier Copyright Act of 1870, only works of "fine art" were declared to be copyrightable, but the limiting phrase "fine arts" in the 1870 Act was dropped in favor of the broader phrase "works of art" in the 1909 Act. That this was an intentional expansion of that which would thereafter be copyrightable works of art was indicated in the testimony

of Herbert Putnam, Esq., then Librarian of Congress, perhaps the most active leader in the pre-1909 copyright revision movement, who declared before the Joint Meeting of the House and Senate Committees in 1906 (Comm. on Patents of the Senate and House of Representatives, 59th Cong. 1st Sess. June 6–9, 1906, page 11):

"After this general statement (concerning 'writings') certain specifications follow in the bill of particular classes under which a particular application is to be made in the office (Copyright Office), but these specifications are coupled with the provisio that they shall not be held to limit the subject-matter. The specifications so far as possible also substitute general terms for particulars. They omit, for instance, the term 'engravings, cuts, lithographs, painting, statues and statuary.' They assume, however, that all of these articles will be included under the more general terms, as 'prints and pictorial illustrations' or 'reproductions of a work of art' or 'works of art' or 'models or designs for works of art.' *The term 'works of art' is deliberately intended as a broader specification than 'works of fine arts' in the present statute* with the idea that there is subject matter (for instance, of applied design, not yet within the province of design patents), which may properly be entitled to protection under the copyright law." (italics added).

This quotation was cited with approval by the Supreme Court in *Mazer v. Stein, supra,* to show that the phrase of "works of art" under the 1909 Act described a new and much broader copyrightable class. It would indeed be violative of the legislative mandate, therefore, if this broader language were to be restrictively construed as equivalent to the narrower phrase of "works of fine arts" found in the Act of 1870, which the present statutory language had replaced.

With this change from the restrictive language of the 1870 Act, no statutory limit now exists upon copyright in an original work of art, regardless of whether it may have a utilitarian or mechanical application. Nothing appears in the present statute or its legislative history to deny copyrightability to a design merely because it may be utilitarian or entitled to a design patent. No statutory or constitutional policy, moreover, would be promoted by reading such a exclusion into the classes of works otherwise copyrightable under §5 as "works of art."

As a matter of fact, it would be an absurd distinction to permit copyright in typeface designs in a collage of designs qualifying as fine art because they are hung on the wall or used as a decorative top of a coffee table, but to deny copyright protection to the same typeface designs merely because they are applied to the "useful art" of printing. To the extent that a distinction is made here, it would more logically follow from the constitutional language of Article 1, §8 if copyright in typeface applied to the "useful arts" or printing were preferred rather than subordinated to the esthetic application of the designs in the field of fine arts.

C. Judicial Background

The copyrightability of typeface designs has not been the subject of any direct judicial determination, a result which might be expected in view of the prevailing prohibition of the Copyright Office Regulations against registration of these designs. For instance, since the Copyright Office has refused to register claims of copyright in typeface designs under its present Regulation §202.1(a), no judicial test of their copyrightabality could evolve in the traditional context of a copyright infringement proceeding, as without a copyright certificate on such a design the copyright claimant would have no standing to sue under §13 Title 17 U.S. Code. As a result, the only alternative for a direct review of the copyrightability of these typeface designs would have been an action against the Register of Copyrights to compel registration of the designs, and there apparently has been no such challenge to date of the Register's authority to reject claims of copyright in these designs under its present regulations.

Still there has been at least one decision indicating that original typeface designs or creative lettering are copyrightable. In *Amplex Manufacturing Co. v. ABC Plastic Fabricators, Inc.*, 184 F. Supp. 285, 287 (E.D. Pa. 1960), the court determined that modifications to the basic letter designs known as "Condensed Egyptian Style" were copyrightable, stating:

"Applying the extremely liberal test which had been used to determine whether an illustration is capable of copyright, we think it beyond question that both the arrangements of the Egyptian and modified Egyptian lettering appearing on pages 18 and 20 of the plain-

tiff's catalog . . . contain enough originality and creativeness to justify protection under the Copyright Act, 17 USCA Sec. 1, et seq. Since the case of Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903), only a modicum of originality has been required to justify copyright protection. . . . Although the Egyptian lettering may be but an arrangement of letters which themselves were undoubtedly part of the public domain, the distinguishable variation in the arrangement and manner of presentation—the dark background, the particular size of the letters, their spacing, their arrangement in three rows—all combine to give the product independent authorship worthy of protection against copying."

One of the leading authorities in the field of copyright, namely "Nimmer on Copyright," approved the result as well as the implications for copyrightability of the entire field of original typography, which includes typeface designs. His support for the copyrightability of this material is specifically declared in §33 at page 139 of his treatise:

"However, one who reproduces a public domain work in original typography should be able to obtain a copyright upon such a derivative work so as to preclude others from photographing the pages of the work even though such copyright will not preclude a copyright of the words as distinguished from the typography."

While there has been understandably a paucity of cases specifically dealing with the copyrightability of typeface designs, the general judicial attitude seems to favor the copyrightability of these works. In addition to the bench-mark cases on this subject of *Burrow-Giles, Bleistein* and *Mazer v. Stein, supra,* the generally accepted doctrine applicable to the copyrightability of all works of art is typified by *Pellegrini v. Allegrini,* 2 F.2d 610 (E.D. Pa. 1924) wherein the court stated at 610–611:

"(The) motive underlying design patents and copyrights of works of art is one which is readily appreciated. The beautiful and the development of love of the beautiful and of the artistic sense and taste is as much necessary to a well-rounded life as are the useful things. A like comment applies to our national life.

It is well, therefore, to encourage the production of works of art. This policy is in line with, and in one sense an extension of, the policy avowed in our Constitution 'To promote the Progress of Science and useful Arts.' "

The broad standard of copyrightabality encompassing typeface designs was probably best re-stated by the 2nd Circuit Court of Appeals in its 1951 decision in *Alfred Bell & Co. v. Catalda Fine Arts,* 191 F.2d 99, 102, holding:

" 'Original' in reference to a copyrighted work means the particular work 'owes its origin' to the author. . . . It is clear, then, that nothing in the Constitution commands that copyrighted matter be strikingly unique or novel. . . . All that is needed to satisfy both the Constitution and the statue is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' Originality in this context 'means little more than a prohibition of actual copying.' No matter how poor artistically, the 'author's' addition, it is enough if it be his own."

D. Legal Arguments Advanced By Those Who Oppose Copyright Registration for Original Typeface Designs

Those who would oppose the adoption of the amendment to §202.1(a) of the Copyright Office Regulations to permit copyright registration for original typeface designs have failed to mount any sound legal argument against the copyrightabality of such designs, presumably because the constitutional, statutory and case law is to the contrary. To the extent that some legal cases or propositions have been or may be advanced, this statement will seek to anticipate such cases or arguments and show their inapplicability.

D.(1) The Utilitarian Aspect of Typeface

The argument against copyrightability on grounds of the utilitarian aspect of typeface designs is unfounded.

As indicated earlier in this statement, there is no limitation imposed by either the constitutional provision or the copyright statute which would render uncopyrightable an otherwise copyrightable work of art merely because it had a utilitarian or mechanical application. As stated

in *Rosenthal v. Stein,* 205 F.2d 633, 635, cited with approval in *Mazer v. Stein, supra:*

"The theory that the use of a copyrighted work of art loses its status as a work of art if and when it is put to a functional use has no basis in the wording of the copyright laws and there is nothing in the design-patent laws which excludes a work of art from the operations of the copyright laws."

One source of a possible misapprehension that the usefulness of a work of art may destroy its copyrightability is the old case of *Baker v. Selden,* 101 U.S. 99 (1879). In that case, the court was concerned with whether copyright on a bookkeeping form could be extended to protect the underlying business system. In a decision stressing the principle that the underlying business system was protectible if at all under the patent laws, the court held that no copyright protection would be recognized in the business form if the only way of using the underlying, uncopyrighted system would be to copy the business forms. In the process, the court embarked upon a rather confusing distinction between the "use" of the underlying, uncopyrighted system and the "explanation of the use" which was copyrightable, a dichotomy which has been more puzzling than enlightening in subsequent years. However, even the most negative aspects of *Baker v. Selden* would not deny copyright protection to original typeface designs. First, copyright in a typeface design would not preclude the *use* by others of any of the thousands of uncopyrighted typeface designs which are presently available, so that the process of printing and the use of type would not necessitate the use of a new copyrightable typeface design. Second, *Baker v. Selden* was adopted in a statutory setting when utilitarian works of art were not copyrightable. At the time of this earlier decision, only works of "fine art" were copyrightable under the Act of 1870, so that the case is devoid of application to the broader class of "works of art" today. Finally, *Baker v. Selden* would have very limited if any application today except in the factual context of business forms and the criticism of the case as well as the need for a highly restrictive application is well summarized in §37 of "Nimmer on Copyright." In §37.4, Professor Nimmer states:

". . . By implication, at least, the Mazer opinion suggests that the *Baker v. Selden* distinction between

copyright for use and copying for explanation was a dictum which will no longer be followed. . . . In dealing with works designed for utilitarian function, as with all copyrighted works, the question of liability should turn simply on whether the defendant has copied copyrightable elements contained in the plaintiff's works, without regard to the manner in which the defendant uses or intends to use the copied material. Thus even if the copied material is to be used for purposes of explanation, there should be no finding of infringement if all that was copied was the non-copyrightable idea. If, however, there is a copying of the copyrightable expression then an infringement should be found even if the defendant employs the material for use rather than for explanation."

Actually, the courts have tended to ignore the utilitarian aspects of otherwise copyrightable works of art. Even under the earlier and more restrictive language of the 1870 Copyright Act, some utilitarian works of art were copyrighted, such as playing cards. See *Richardson v. Miller*, 20 Fed. Cas. 11791. The trend in more recent cases is typified by *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F. Supp. 142, 120 USPQ 158 (S.D.N.Y. 1959), where the court upheld the copyrightability of a fabric design though utilitarian and entirely inseparable from the function of the fabric itself.

Any question that the utilitarian nature of a copyrightable work, such as an original typeface design, would not impair the copyrightability of the work of art should have been finally laid to rest in the case of *Mazer v. Stein, supra,* wherein the court stated at page 211:

"Verbal distinctions between purely esthetic articles and useful works of art ended insofar as the statutory copyright language is concerned."

Then the court added and blessed the earlier statement of Librarian of Congress Putnam at the pre-1909 hearings, at page 213 of its decision:

"The term 'works of art' is deliberately intended as a broader specification than 'works of fine arts' in the present statute with the idea that there is subject-matter (for instance, of applied design, not yet within the province of design patents), which may properly be entitled to protection under the copyright law."

D.(2) The Exclusive Applicability of the Design Patent Laws

It is sheer fallacy that any design protectible under the patent laws is not copyrightable.

Nothing appears in the constitutional provision or the copyright statute limiting the copyrightability of a design or work of art to that which is not patentable, or actually patented. Several cases indicate that there is no conflict between the copyright and patent laws relating to utilitarian or industrial designs, even though the patent and copyright laws are overlapping and both provide protection in this area. Hence, whether a design or specifically a typeface design is patentable or the subject of an existing design patent does not preclude its eligibility for a copyright. Support for this proposition is amply provided in *Mazer v. Stein, supra,* wherein the court stated at pages 216–217:

"Petitioner urges that overlapping of patent and copyright legislation so as to give an author or inventor a choice between patents and copyrights should not be permitted. We assume petitioner takes the position that protection for a statuette or for industrial use can only be obtained by patent, if any protection can be given. . . . As we have held the statuettes which here involved copyrightable, we need not decide the question of their patentability. Though other courts have passed upon the issue as to whether allowance by the election of the author or patent of one bars a grant of the other, we do not. *We do hold that the patentability of the statuettes, fitted as lamps or unfitted, does not bar copyright as works of art.*" (italics added).

Any doubt whether the creator of a design must elect between the copyright and patent laws or whether patentability of the design preempts copyrightability has been consistently rejected since *Mazer v. Stein.* In the case of *In re Yardley,* 181 USPQ 331 (CCPA 1974), the court rejected the argument that an author of a watch face design must elect between copyright and patent laws. Relying upon *Mazer v. Stein* as well as an earlier decision of that court *In re Deister Concentrator Co. Inc.,* 289 F.2d 46, 129 USPQ 314, the court held:

"We believe that the 'election of protection' doctrine is in direct conflict with the clear intention of Congress manifested in the two statutory provisions

quoted above. The Congress has provided that subject matter of the type involved in this appeal is 'statutory subject matter' under the copyright statute and is 'statutory subject matter' under the design patent statute, but the Congress has not provided that an author-inventor must elect between securing a copyright or securing the design patent. Therefore, we conclude it would be contrary to the intent of Congress to hold that an author-inventor *must* elect between the two available modes of securing exclusive rights. . . . These prior cases appear to recognize the existence of an area of overlap, but they say that both copyright and design patent protection cannot be obtained for the same subject matter. We do not see any positive legal authority supporting this view. To paraphrase the Supreme Court in *Mazer v. Stein:* Neither the copyright statute nor the patent statute says that because a thing is copyrighted it may not be patented as a design. We should not so hold."

D.(3) The Time Honored Sanctity of Regulation 202.1(a)

No reason exists against amendment of the Copyright Office Regulation §202.1(a) to permit the registrability of typeface designs.

§202.1(a) of the Copyright Office Regulations, denying registration of typeface designs, was first introduced into these regulations on June 18, 1959, as published in 24 F.R. 4955 and reprinted in the Copyright Office Circular 96. No court decision, however, has blessed this prohibition as a valid interpretation of the statute and, in view of the non-registrability of typeface designs under this regulation, no court would have had an occasion to comment upon the propriety of this new regulation, so that the passage of years since its adoption should give no particular weight to its legality.

The landmark case in the area of copyrightability of works of art, namely *Mazer v. Stein, supra,* was decided in 1954 or five years before §202.1(a) prohibited registration of typeface designs. In that case, the Supreme Court found nothing in conflict between the then existing language of the Copyright Office Regulations and its holding that a lamp-based design was copyrightable. It is true that in *Mazer* the court made a passing reference to the then existing defini-

tion section of "works of art," namely §202.8, which provided:

"This class includes works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned . . ."

It is important to note, however, that the Court did not approve the exclusionary language of §202.8 relating to "mechanical or utilitarian aspects." Rather, in *Mazer* the court specifically rejected such exclusionary language in the following passage of its opinion at page 218:

"Regulation §202.8 *supra,* makes clear that artistic articles are protected in 'form but not their mechanical or utilitarian aspects.' See Stein v. Rosenthal, 103 Fed. Supp. 227, 231. The dichotomy of protection for the aesthetic is not beauty in utility but art for the copyright and the invention of original and ornamental design for design patents. *We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars an invalidation of registration. We do not read such a limitation into the copyright law."* (italics added).

Any doubt that the exclusionary language of old §202.8 was thereby rejected would seem to have been eliminated by the Court's citation of *Rosenthal v. Stein* in the same context, a case extolling the proposition that a copyrightable work of art does not "lose its status as a work of art" if and when it is put to a functional basis.

Actually, §202.8 probably did not preclude the registrability of original typeface designs. There is nothing in the background of this regulation or its predecessor versions to indicate that this regulation was prepared with the view of denying registration to typeface designs. Doubtlessly, the question never came up and it would not have been necessary or proper to have excluded typeface designs from the class of copyrightable works of art when such designs were not within the contemplation of those framing §202.8. In addition, the exclusionary language of this regulation did not necessarily embrace typeface designs.

The utilitarian function of type or typeface is its legibility or ability to convey information. A new typeface is not created to increase legibility—there are already thousands of perfectly legible typefaces in the public domain.

Rather a new typeface design is created to provide a new aesthetic or visually pleasing quality, a new visual experience or distinctive mood or style, none of which would bear upon the functionality of typeface in terms of legibility or the ability to convey information. Hence, even if old §202.8 be deemed to have been approved by *Mazer v. Stein* or the passage of time, still original typeface designs would have been registrable under that regulation because of the non-functionality of the design element. In any event, any doubt as to the copyrightability of typeface designs under such a regulation certainly should have been resolved in favor of registration under the Copyright Office's practice of resolving doubts as to the copyrightability of a work in favor of registration.

D.(4) The "Storch" Case

The Copyright Office should not defer amending §202.1(a) because of the pending case of *Leonard Storch Enterprises v. Alphatype Corporation* (Docket No. 74–165 in the U.S. District Court for the Southern District of New York).

It should be recognized that the Copyright Office adopted in 1959 the present regulation §202.1(a), prohibiting the registration of typeface designs, without a judicial determination on the subject. Hence, it is a little illogical to argue that the Copyright Office now cannot or should not change this regulation without a judicial determination.

It should also be acknowledged that the traditional methods for a judicial determination on the copyrightability of a particular subject matter are an action for infringement and an action against the Register of Copyrights to compel registration of a rejected copyright claim. The pending *Storch* case offers neither of these methods or settings. Yet, the *Storch* case has been touted as a matter likely to produce a judicial determination on the question of copyrightability of typeface designs. An examination of the court file in this matter discloses that many other issues are raised. In addition, the issue of the copyrightability of typeface designs is not directly posed. Instead, this issue arises tangentially to the questions whether Alphatype has the right to affix a copyright notice to a type font when there is doubt as to its copyrightability and whether two rather unrelated copyright registrations can be stretched to cover certain incidental typeface designs.

One of the copyright registrations involves a work en-

titled "Catalogue of Alphatype Fonts on Filmstrip Form" copyrighted by Alphatype Corp., March 3, 1974, under entry No. A: 521874. On Line 5 of this application for registration there is the disclaimer that copyright is asserted only on the "compilation and textual material at end of filmstrip." This limitation on the claim of copyright disavows any protection on the typeface designs and, despite any assertions of the parties in *Storch v. Alphatype* to the contrary, the court in that case could and would not adjudicate the copyrightability of typeface designs embodied in a work on which the copyright in such designs has been expressly disclaimed, presumably to secure copyright registration on the balance of this work.

The only other registration recited in the *Storch* case concerns a filmstrip entitled "Alphasette Informat on Film Strip," copyrighted by Alphatype Corp., July 12, 1973, under entry No. JP: 15310. Class "J" in which this registration was secured normally provides protection to the photographer only against duplication of his work product and gives protection to the subject matter of the photograph or filmstrip only in the rarest of cases. Here an examination of the filmstrip shows it to be an advertisement and that copyright registration was permitted to cover the substantial textual material embodied in the filmstrip, and not the incidental frames of type font.

The only question remaining in the *Storch* case relevant to the issue of the copyrightability of typeface designs is whether Alphatype has a right to affix a copyright notice on any of its type fonts and whether this is a justiciable issue which will entitle Storch to a declaratory judgment. It is obviously beyond the means and scope of this memorandum to thoroughly evaluate the issues in the *Storch* case, but even assuming that the parties do not settle the case, it would be appropriate to mention at least one reason why the court would or should not adjudicate the issue of copyrightability of typeface designs.

Storch is challenging the copyrightability of Alphatype's typeface designs, while admitting that applications to register these designs are presently pending in the Copyright Office. Yet, under clearly established legal principles, there would be no justiciable case or controversy on the issue of the copyrightability of these designs until the administrative proceedings in the Copyright Office have been exhausted. In this regard, Moore's Federal Practice §57.16 states:

"The declaratory judgment may not be used as a means of evading the general doctrine, which requires the exhaustion of available administrative remedies before resorting to federal judicial remedies (citing numerous cases) . . . Intervention by the courts prior to final administrative determination would undermine orderly administrative procedures."

In the *Storch* case, there has been no administrative determination on Alphatype's applications. In some cases a preliminary administrative determination, as opposed to no determination on a pending matter, fails to provide standing to sue even if it causes some detriment to the litigant. *U.S. v. Los Angeles & S.L.R. Co.,* 273 U.S. 299 (1927).

In addition, Storch must show direct, not hypothetical, damage to be entitled to standing to seek a judicial declaration on the copyrightability of typeface designs. In this case, there would be no direct damage to Storch until Alphatype's copyright applications are registered, if only because Alphatype is barred by §13, Title 17 USC, from instituting a copyright infringement action until it has first secured appropriate copyright certificates. Even pecuniary loss by Storch from the distribution by Alphatype of type fonts with a copyright notice would not necessarily entitle Storch to a declaration of non-copyrightability of these designs. See, *Aralac Inc. v. Hat Corporation,* 64 F.Supp. 696, aff'd, 166 F.2d 286 (CA 3rd 1946). Actually, the failure of the Copyright Office to register the pending applications on Alphatype's designs is equivalent to a refusal to register in view of the obstacle to registration under Regulation §202.1(a), in which case any adjudication of the copyrightability of these designs would be a prohibited advisory opinion. See, *Alabama Federation of Labor v. McAdory,* 325 U.S. 450 (1945).

Allowing Storch to secure a preliminary court determination on the copyrightability of these pending applications would usurp the administrative functions of the Copyright Office. If clarification of this issue is desirable, as all must agree, then the Copyright Office instead should register Alphatype's pending applications, as opposed to exercising any notion of administrative restraint in the face of the *Storch* case, to open the door to a direct judicial determination on the copyrightability of typeface designs. Such would end the speculation and long wait which has created so much mischief in this area.

D. (5) The Harriet Oler Study of 1972 recommending against registration of the claim of copyright in typeface

Harriet Oler's 1972 Study tended to support rather than bar the copyrightability of typeface designs!

In 1972, Harriet L. Oler, an attorney in the Copyright Office, completed a study entitled "The Copyrightability of of Typography and Regulation §202.1 (a)." While her conclusions were not favorable to changing the Copyright Office practice to allow registration of typeface designs, it is interesting to note that none of the decisions cited by her declared typeface designs to be uncopyrightable and that many found a protectible property interest in certain elements of typography and some implied that typeface designs were copyrightable. A brief review of some of these cases would seem appropriate if only to show that the Copyright Office itself has found no legal obstacle to registering typeface designs.

D. (5) (a.) G. Ricordi and Co. v. Haendler, 194 F.2d 914 (2nd Cir. 1952):

This was an action for unfair competition in connection with photographing a book on the grounds that the typography in producing the book through the skill of the engravers involved a protectible property right. No issue of copyrightability of typeface designs was presented or decided in that case and the court at page 915 of its decision made this clear in the following language:

"Therefore, we need consider only the possibility that typography was not copyrighted . . . whether this result (copying) could be avoided by annexing to the copyright notice a reservation of the 'author's' rights in the typography we need not say."

The most pertinent observation which can be extracted from this case is that Judge Learned Hand, by referring to the producer of typography as an "author", implied that typography was a writing and, hence, might be copyrightable.

D. (5) (b.) Desclee & Cie, S.A. v. Nemmers, 190 F.Supp. 381 (E.D. Wisc. 1961):

This was an action for unfair competion to enjoin the photographic reproduction of plaintiff's publications,

wherein the court seemed inclined to apply the *International News* doctrine (*International News Service v. Associated Press*, 248 U.S. 215) to uncopyrighted material if an unusual commercial value was involved. Here, the court found that the rhythmic signs of the Solesmes Method for singing Gregorian chants was not only "typography" but specifically "literary property of a scientific or artistic nature." Hence, the implication of the case is that the rhythmic signs were copyrightable but since published without a copyright notice this material would not be protected under any companion theory of unfair competition. To the extent that the application of these rhythmic signs is copyrightable, certainly the creative work product of a typeface designer should be given copyrightable protection.

D.(5)(c.) Bailey v. Logan Square Typographers, Inc., 441 F.2d 47 (CA 7th, 1971):

This was an action for wrongful appropriation of alphabet styles, in which the courts found a property right in the designs of individual lettering. The copyrightability of these designs was implicit in the court's argument that *Sears* and *Compco* would apply if the designs were published. Furthermore, the applicability of the copyright statute to these designs was recognized in the court's acknowledgement that common law protection was available under §2 of the copyright statute if these designs were unpublished.

D.(5)(d.) Schulsinger v. Grossman, 119 F.Supp. 69 (S.D.N.Y. 1954):

This decision constituted direct authority for the copyrightability of accent and cantillation marks over Hebrew characters whose function, like typeface, was to convey information on the meaning and pronunciation of the language involved. On page 393 of that decision, the court stated:

"Defendants contend that the five books of Moses are in the public domain and not subject to copyright. The copyright law is to the contrary as to an edition of the five books of Moses with accents and cantillation marks supplied by the scholarship of the authors."

It is to be noted that, if a new arrangement of accent and cantillation marks are copyrightable, certainly the new de-

sign of accents, symbols or lettering should likewise be copyrightable.

D.(5) (e.) Surgical Supplies Service, Inc. v. Adler, 206 Fed. Supp. 564 (E.D. Pa. 1962):

The court found a copying of price lists to be unfair competition, though these lists lacked the "genius and industry as to fall within the copyright statutes." Even though the case was factually unrelated to the issue of copyrightability of typeface designs, it is noted that the court's formula for statutory copyrightability, namely "genius and industry," while far exceeding the "something more than a trivial variation" test of *Bell v. Catalda, supra,* would nevertheless describe the creativity, skill and industry necessary to produce a new typeface design. Hence typeface designs would seem to be copyrightable even under the theory of this case.

D.(5) (f.) Pantone v. A. I. Friedman, 294 F.Supp. 545 (S.D.N.Y. 1968):

Here, the court found copyright in bands of arrangements of paint colors which also were functional, in the sense of conveying information to purchasers of paint. Consequently, copyright was allowed on the new arrangement of public domain paint hues, which involved a much more elementary version of the more complicated process of selecting, combining, weighting and arranging the elements which go into new typeface designs. In addition, and to the extent that the utilitarian aspect of a work is still critical to copyrightability, the color information provided by Pantone was much more inextricably tied to the informational function of the color charts than the aesthetic aspects of typeface design to the function of letters in conveying thought. If the combination of colors is copyrightable, then certainly the combination of arcs, lines, shading, serifs and the other elements of typeface is certainly copyrightable. In this connection, Harriet Oler seems to agree in the statement on page 23 of her 1972 study:

"The court (in the Pantone case) seems to be recognizing copyright protection for an original arrangement and presentation of standard material."

E. Miscellaneous cases allegedly in opposition to copyrighting typeface

Certain miscellaneous cases, cited in opposition to the

amendment of §202.1(a), are not applicable here as illustrated by the following analysis.

E.(1) Fashion Design cases.

E.(1)(a.) Fashion Originators Guild of America v. FTC, 114 F.2d 80 (CCA 2, 1940):

This case was concerned with an entirely different matter than the copyrightability of an original typeface design, namely with the review of an order by the Federal Trade Commission directing the Fashion Originators Guild to cease and desist from certain unfair trade practices in interstate commerce. To the extent that the court concerned itself even with the copyrighability of designs in that case, namely dress designs only, there was a strong implication that even such dress designs might be copyrightable. First, the court stated at page 84:

"We conclude therefore that, regardless of whether Guild's designs could be registered or not, 'publication' of them was a surrender of all of its 'common law property' in them."

Then, the court implied that these designs would be copyrightable if the Copyright Office permitted their registration, in the statement almost immediately following on the same page:

"It may be unfortunate—it may indeed be unjust—that the law should not thereafter distinguish between 'originals' and 'copies'; but until the copyright law is changed or until the Copyright Office can be induced to register such designs as copyrightable under the existing statute, they both fall into the public demesne without reserve."

E.(1)(b.) Cheney Bros. v. Doris Silk Corp., 36 F.2d 279 (CCA 2d 1929):

The court in this case did not determine the copyrightability of a dress design, since no copyright had been claimed nor any copyright sought. Rather, the court was only concerned with a claim of unfair competition or claim of common law property right in the dress design. In this regard, the court said, somewhat echoing the lower court attitude, "Again it is impossible to copyright them (dress designs) under the Copyright Act, or at least so the authorities of the Copyright Office hold." This is a merely

gratuitous statement or dictum by the court in recognition that the Copyright Office under its existing Regulations would not register these dress designs for copyright.

E. (1) (c.) Jack Adelman, Inc. v. Sonner's & Gordon, Inc., 112 F.Supp. 187 (S.D.N.Y. 1934):

In this case, the court essentially declared that copyright in a two dimensional drawing of a dress did not carry with it the right to control the manufacture or duplication of the dress in a three-dimensional form. The rational of this case has been rejected as in conflict with the cartoon and three-dimensional cases, which held that a three-dimensional reproduction of a two-dimensional copyrighted work was nevertheless a "copy" and, hence, an infringement. The Copyright Law Revision Study No. 3, *supra,* at page 106, soundly criticized this case:

"The decision of the court (in the *Adelman* case), would seem indefensible today, particularly in light of the previous discussion concerning three-dimensional objects and the minimum required standards of originality and artistic creativity."

Furthermore, the court implied that dress designs were properly protectible under the patent laws, again an approach which is in conflict with the more recent cases holding that the creator of a design need not make such an election and may indeed enjoy copyright as well as design patent protection for the same work. Lastly, the court did not make any extensive examination of the copyright statute and the earlier cases as to what constituted a "work of art," but seemed to rely substantially on the Copyright Office practice of not registering dress designs. Accordingly, it would not be unreasonable to assume that the court's attitude would have been the reverse had the Copyright Office then permitted registration of dress designs.

E. (2.) Vacheron Watches v. Benrus Watch Co. Inc., 155 F.Supp. 932, 115 USPQ 115, aff'd in part 260 F.2d 637, 119 USPQ 189 (CA 2d 1958):

This case was decided primarily on the point that the plaintiff could not maintain the action for copyright infringement because of a failure to register its claim of copyright as a condition precedent to the action, as required by §13, Title 17 USC. By way of dictum, the court went

on to say that plaintiff's watch face design was uncopyrightable, but it is clear that such finding was based substantially if not entirely upon the interpretation of the copyright statute embodied in what was then copyright Regulation §202.10(c), which is similar in import to the regulation being presently considered for amendment. The court in the *Vacheron* case made no examination or study into the legal or statutory basis of this copyright regulation and it is a reasonable assumption that had the Copyright Office regulation been different to allow registration of the watch face design in spite of its utilitarian application, the court would have similarly relied upon such a copyright regulation and found the watch face to be copyrightable.

E.(3.) Design Patent Cases.

E.(3)(a.) American Type Founders Co. Damon and Peets, 140 Fed. 715 (S.D.N.Y. 1905):

This was a suit for infringement of a design patent on a font of a type. The court made a finding that there was no patentable invention because the font showed no peculiar configuration or ornamentation in the type as would authorize a design patent. Nothing appears in this case which would preclude an original and creative typeface from securing design patent and/or copyright protection.

E.(3)(b.) *Keystone Type Foundry v. Portland Publishing Co.,* 180 Fed. 301, (D. Maine, 1910) aff'd 186 Fed. 690 (CCA 1st, 1911):

The court merely held in this case that the maufacturers of a peculiar style of type, which was uncopyrighted and unpatented, could not restrain another form producing similar type under a common law theory of unfair competition.

F. Registration of Typeface Design Would Impose No Particular Burden Upon Authors and Reprinters

Concern was expressed at the November 6, 1974 Copyright Hearing and in subsequent exchanges that registration of typeface designs might impose restrictions upon the author or reprinter. Specifically, it has been urged that an author might find copies of his initial publication recalled and destroyed if set in infringing typeface or that the author and his reprinter might not be permitted to

reprint a work, originally set in a copyrighted typeface design, when the book is out of print.

The problem of whether a publisher may innocently or willfully publish an author's work in an infringing typeface design is a matter which directly affects the publisher and not the author. No liability or damages would be incurred by the author either as a co-infringer or contributory infringer of a publication originally set in infringing typeface since the author would normally not control nor seek control of what typeface the publisher selected for printing the author's work. In the unusual situation where the publisher has used or selected an infringing typeface, either because of a failure to select one of the 10,000 public domain typefaces or because of the failure to have used type set from an authorized source of copyrighted typeface, the loss in such case would be the publisher's, who would then have the obligation to promptly reprint the author's work with non-infringing type. Actually, the possibility that any publisher, much less a large book publisher, would use infringing typeface is most remote if only because publishing houses deal with reputable typesetters who would purchase copyrighted typeface designs where necessary from the copyright proprietors or their licensees.

The second concern on the part of the authors, namely that copyright in typeface designs would be a restraint upon the reprint of their works, is also without merit. The standard author-publisher agreement includes a grant from the author to the publisher of rights of publication generally for the entire period of copyright and any renewal, subject of course to the author surviving to make the renewal. Accordingly, the author would normally not reserve any publishing rights in his agreement as would enable him to convey these rights to a reprinter or another publisher. In some of these agreements, the author does have the right upon written notice to cancel the publishing agreement when the book is out of print and when the publisher is unwilling to reprint same, but in such a situation the author normally would also have the right to purchase publisher's printing plates at a nominal cost. Whether the author under a reassignment of rights reprints his book from the original printing plates or reproduces the original book by photocopying or another technique would not make the reprinted edition an infringing copy of any copyrighted typeface design, since the author or his reprint house would in either case be the successor-in-interest to the publisher and

would thereby be making an authorized use of any copyrighted typeface. The representation that publishers routinely reassign to authors publishing rights in their works five years after publication is just not true, but again the right to reproduce any copyrighted typeface originally given to the publisher would pass under any such reassignment to the author as would enable him to reprint his work from the original plates or printed pages.

G. Conclusions of Constitutional Statute and Judicial Analysis

By way of summary, no constitutional, statutory or case law obstacle is found to the copyrightability or registrability of original typeface designs. Instead, the creative and original work product of a typeface designer would clearly seem to fall within what is copyrightable under the present statute and under the judicial decisions interpreting the statute, particularly *Mazer v. Stein* and the several cases following and relying upon this Supreme Court decision.

It has long been the practice of the Copyright Office to follow the "rule of doubt" in making copyright registrations. In connection with videotapes and again in connection with computer programs, the Copyright Office exercised this "rule of doubt" in favor of registration, typically stating in Circular 61 relating to computer programs:

". . . In accordance with its policy of resolving doubtful issues in favor of registration wherever possible, the Copyright Office will consider registration for a computer program if certain requirements have been met."

It is to be noted that the Copyright Office, in exercising its "rule of doubt," permitted the copyright registration of computer programs as "books," though there certainly is a wide semantic if not legal disparity between computer programs and books. Hence, to the extent that doubt exists as to the copyrightability of orignal typeface designs, the Copyright Office seems obliged to comply with its own "rule of doubt" and resolve such doubt in favor of registration of these designs.

Miss Oler also expresses sympathy for the view of permitting registrations of typeface designs, particularly where the Copyright Office apparently has any doubt as to registrability of such a work. On page 25 of her 1972 study, Miss Oler states:

"It is extremely important that Office policy regarding registrability of a particular type of work be sound, for its practice is the only route open to most applicants. True, a prospective copyright applicant may have ultimate recourse to the courts, but not until he has first either exhausted his administrative remedies and waded through the time-consuming, expensive mandamus procedure or been called into court as a defendant in an infringement suit. Even if he perseveres to this extent, he might face the burden of disproving the validity of Office actions to the court. So, the Office should not be too quick to deny registration to any given class of material."

The creative products of typeface designers, involving considerable skill, energy and time in their creation, have been discriminated against long enough. It is manifest that their original designs have always been copyrightable under the Act of 1909 within the clear and unambiguous meaning of "works of art." No Copyright Regulation was ever necessary to register or regulate the registration of these designs as works of art under §5(g) of this Act, except possibly to provide adequate space on the copyright application form for such information as the Copyright Office might require in connection with these designs. No regulation would now be required to make them registrable if it were not for the present language of §202.1(a) which was earlier adopted in the belief that certain utilitarian works of are were unregistrable. Hence, it would now be appropriate to amend the regulation to restore it to harmony with the copyright statute in order to permit registration of these designs as was originally contemplated.

IV. Legibility

The opponents of the copyrightability of typeface have argued that typeface is a useful article because of its legibility, and that the inherent quality of typeface is legibility. Manifestly, legibility is an attribute of all basic letter forms. But beauty and aesthetic value is the principal attribute of typeface.

Reduced to simplicity, typeface is a specific set of design ideas used to clothe a basic letter form. It is this set of design ideas which is totally aesthetic or artistic, and which is properly the subject matter of copyright, provided it is original.

It is significant that legibility is not an aboslute, but varies according to the familiarity of the reader with the basic letter form. Illustratively, the black letter of the Renaissance Period was highly legible to a 16th century reader. It has almost completely dropped out of use today, and is illegible to all but those archivists who have had to acquire a familiarity with it.

In short, legibility is essentially a matter of familiarity of the reader with a basic letter form. Any letter forms that correspond readily to the images expected by the reader will prove to be highly legible. Those that differ from the expectations will not.

How the designer clothes the basic letter forms with his own systematic series of designs is his artistic creation. Ironically, the greatest danger to the designer is that his artistic ornamentation of the skeletal letter form will destroy its legibility, and not, as some contend, that the ornamation will increase it.

Viewing the creativity and originality with which a designer clothes the typeface letter forms from a different light, it is arguable that maximum legibility would be achieved if all type setting and printing was standardized on a single letter form. But how dreary the world would look if all letters were in fact identical: The human mind and eye demands some relief from such simple utility. This relief is found in the type designer's art, possibly at some small cost in legibility.

V. The Enduring Life of Typeface

The useful life of typeface is measured not in years, but in tens and occasionally hundreds of years. Illustratively, a typeface called "Bembo" was cut in 1496 for Aldus Manutius by Francesco Griffo Da Bolonga for use in Cardinal Bembo's account of a volcanic eruption in a book entitled "De Aetna." It is still in wide commercial use today.

Other exmples of typefaces in current use today include Garamond designs from about 1550, Robert Granjon designs from about 1570, Nicholas Kis designs from about 1690, and John Baskerville designs from about 1760.

One of the basic and standard typeface designs in use today is Century Expanded, developed in 1894 by Theodore Lowe Devinne in collaboration with Linn Boyd Benton for the Century Magazine. It is still popular 80 years after its introduction.

Perhaps the most popular text typeface today is Times Roman, which is only now hitting its stride 43 years after its introduction in 1931. Excelsior, probably the world's most used typeface for news text, was designed in the same year.

The best of the new Swiss sanserifs, a typeface cut in 1959 and called Helvetica, is now rapidly growing in popularity. Its full measure of success will not be known for another 10 years or so. It may be aptly said that, at age 15, Helvetica is just starting its career.

The foregoing illustrates the enduring character of typeface designs. They are not designs which, by their nature, have a short life—such as dress designs, automobile designs, some furniture designs, and the like. The exception would be certain "trendy" designs which come and go with the fashion vogue.

It is particularly significant that typeface design does not become popular over night—it takes years of expense in publicizing and establishing the typeface design amongst the handful of art directors and adventurous companies who will go for truly new designs. These initial years are ones of high expense and low return in profits. The average gestation period for developing a market for a new typeface design is from 5 to 10 years, although there have admittedly been certain uncommon instances where a particular typeface market was established in a matter of months.

At the November 6, 1974 hearing in the Copyright Office, concern was expressed over the term of copyright

for typeface. Some said it was too long. The simple fact of the matter is that 56 years may be too short in light of such revivals as the aforementioned Bembo, Granjon, and Baskerville typefaces. It is Mergenthaler's view that the proper term of copyright for typeface is found in the proposed general revision of the Copyright Law—namely, 75 years or the life of the author plus 50 years.

There are, as indicated above, some typeface designs which may have a life of only a few years. But does the long term of copyright protection for these ephemeral typefaces cause anyone harm? If the typeface is commercially dead and of no interest, the protection is harmless. After the few years it doesn't really make any difference if the face continues to be protected for a longer period.

VI. Originality

Any discussion of the originality of typefaces must be prefaced with the recognition that there are more than 10,000 typefaces now in the public domain. The mere fact that there are so many distinct typefaces clearly suggests that there must be something more in each than a mere utilitarian letter form—that something is design! It is axiomatic there can be no claim of copyright in those typefaces in the public domain since they would not be original nor would the claimant be the author. Neither can there be copyright in trivial variations of these typefaces. But there is no logical or legal reason for denying copyright protection to *original* typeface designs.

The creation of a typeface begins with the designer who draws the letter forms or characters just as the artist draws a picture. The final drawings for all the letter forms and characters become the typeface. In today's technology, the typeface drawings are copied onto a grid or other storage means for use in the photocomposition equipment. The reproductions of the drawings on the grid are no more and no less than the original drawings in a different size.

It is particularly significant that the drawings are always two dimensional, which is merely another way of saying that the typeface design is always a series of drawings or reproductions of drawings. There is no issue whether the claim of copyright in the drawings would protect a three dimensional work, for example, a drawing of an automobile grill protecting the grill itself.

The rockbed of originality in a typeface is the limitless wardrobe of design with which the designer clothes the basic skeletal letter forms. Conceiving the design and applying it consistently to all of the letter forms and characters is the job of the designer. It is in this creative process that the designer makes himself felt and distinguishes his typeface design from those which have gone before.

The basic letter forms and characters are obviously in the public domain. Their skeletal images are the same in the designer's mind as in anyone else's. The designer's task, then, is to clothe the letter forms with a design that makes them uniquely his own. This task is complicated by the fact that the design for every character or letter form must blend harmoniously and beautifully with the others, regardless of their position. Thus, it is not a question of designing a group of beautiful letters, but rather designing a beautiful group of letters. In this same vein, one does not

view typeface design by looking at specific letters, but rather a group of letters or the whole typeface.

In all typeface designs, there must be a logical consistency throughout every character which is capable of being recognized, described or perhaps even named. These design elements may actually deter legibility rather than increase it since it is manifest that if the designer embellishes too much, the basic letter forms will no longer be recognizable. Of course, as indicated hereinbefore, legibility is primarily a matter of time and geography—i.e., habit.

If one is familiar with a particular typeface design, no matter how ornate, it is legible to him. Illustratively (fig. 1), reproduced below is a sample of Canon Flamand black letter typeface which was in widespread use in the 16th century, but which is scarcely legible today except to a few archivists:

Antiſthenes ſeyt / dattet beter is met
luttel goede te vechten teghen alle
de booſe / dan met veel booſe teghen
luttel goede: deur dien dat de vꝛo-
micheyt der kriechſ-lieden ende der
hooft-mannen / in de ooꝛloge meer de
victoꝛie by bꝛengt dan de menichte:
oft oock deur dien / dattet beter is te
weſen van tghetal der goede die ouer
al luttel zijn / dan van den hoop der
booſe daer de werelt vol af is.

fig. 1

To demonstrate what a typeface is not, reproduced below is a group of beautiful letters (fig. 2):

harmony

fig. 2

None of these letters blend. Each is independently excellent in its kind. But their overall relationships are incomplete. They do not combine. Decisions made about the design of one letter are not applied to the others, thus militating against their functioning together as a typeface.

In contrast to the group of beautiful letters above, reproduced on the next two pages are samples of beautiful groups of letters (fig. 3) and non-letters (fig. 4), which represent samples of different typeface designs. For each letter group there is a corresponding non-letter group with the same repeating design elements. A reasonably skilled typographer can look only at the non-letter groups and identify the particular design. Thus, it is clear that the design exists regardless of whether it clothes a letter form or a arbitrary nonsensical character. The repeating design characteristics and relationships are the same in both.

The variations in the design elements used to create a typeface are virtually limitless. They include such aspects as the degree of stroke contrast, angle of emphasis, stroke shape, serif or non-serif (sanserif), form, curve form, or arch form. In attempting to identify these design elements, one can look to the letters and characters which would be first considered by a designer since their design would suggest how the remaining letter forms and characters should be drawn. Accordingly, to illustrate the design elements as applied to certain key letter forms, reproduced below are samples of Olympian, Corona, Times and Plantin typeface designs. In the case of the Plantin typeface design (fig. 6), it is also reproduced in the nonsensical, non-letter form.

In the samples (fig. 5), the significant elements have been blacked in—i.e., terminals, arches and round shapes as well as angles of swelling, with a scribed line to show the point of maximum swelling.

Similarly, the serifs have been shaded to show that they occur in three predictable places. The oblique hatching shows base line serifs. The cross hatching shows the serif starting point at the top of the vertical strokes. The vertical hatching shows a less frequent serif sometimes applied in the letters "d" and "u" (see the Plantin samples above).

It will be immediately noted from the samples above that the angle of emphasis indicated by the broken line is horizontal in Corona and slanted in Olympian, Times and Plantin. The slant in Times and Plantin is greater than in Olympian.

To the untrained eye, Times and Plantin may appear

1096

harmony

harmony

harmony

harmony

harmony

fig. 3

1097

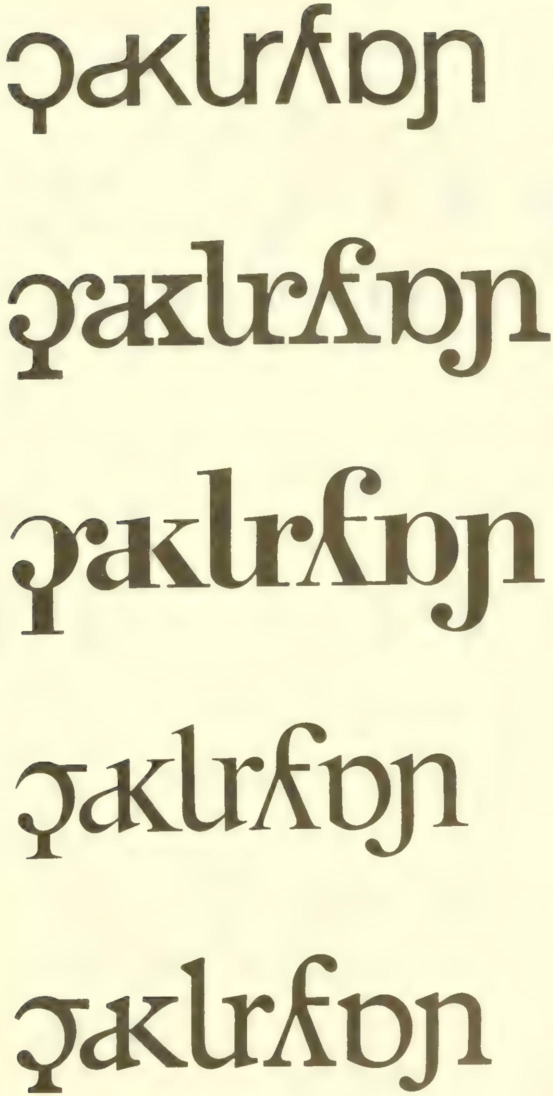

fig. 4

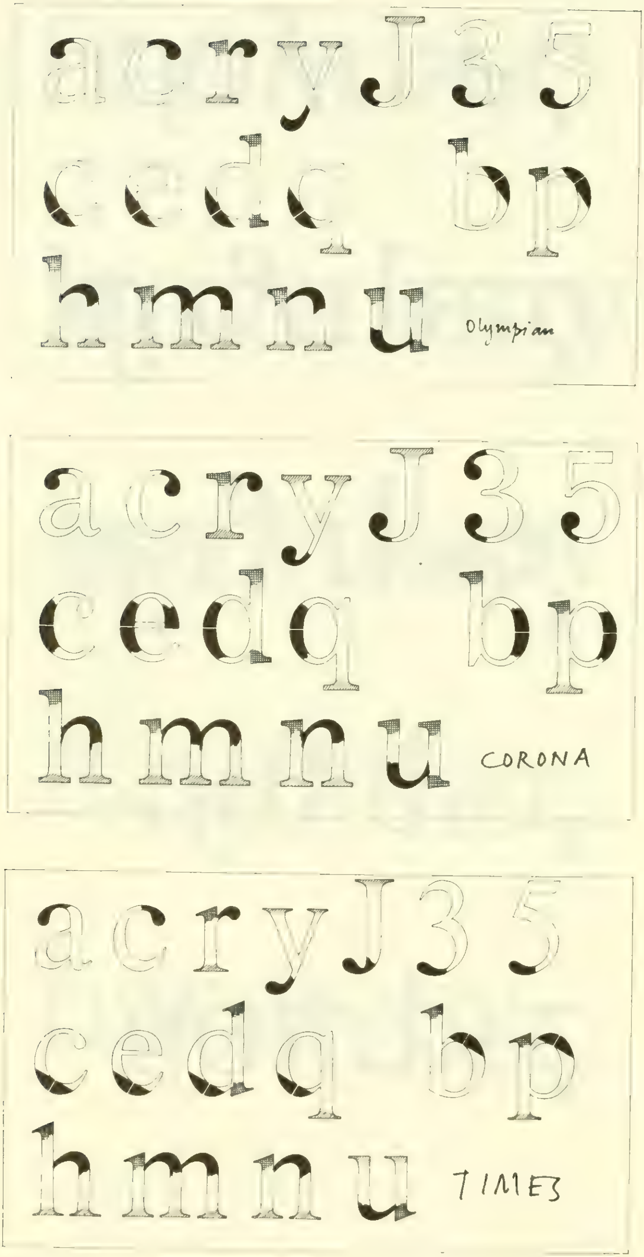
acryJ35
cedq bp
hmnu
Olympian
acryJ35
cedq bp
hmnu
CORONA
acryJ35
cedq bp
hmnu
TIMES

fig. 5

fig. 6

identical. In fact, both have the same historical source, as revealed by their common arched or rounded characteristics. But note the finer pointed serif in Times which does create a different overall visual impression between the designs.

In the case of Corona and Olympian, the terminals in the top row of letters are very prominent, although the actual terminal shapes differ markedly.

Without belaboring the matter, the design elements of a typeface can be expressed in a summary form by extrapolating what is peculiar to it from those letters which are most likely to be concentrated on first by the designer. But a typographer does not recognize a typeface design by minute inspection of every detail. He sees in the typeface all of the design elements as an integrated texture regardless of size, and identifies at once that it is a particular typeface design. This is graphically illustrated by the following excerpts set in Clarendon, Helvetica, Plantin and Times Roman, which create different visual impressions even though set in the same size (fig. 7).

The discipline of making a single consistent design

out of ninety or more characters to be assembled in any order is sufficiently severe that it can be said with absolute certainty that no typeface design "just happened." Someone did it. It had its origins in the creativity of the designer's mind; either with or without reference to existing typeface designs. The designer is an artist. As long as there are artists, there will be creativity, and the search for new design forms will continue.

Once a typeface is designed, it may be altered to different sizes, thicknesses, widths, or angles without changing the basic design elements in any way. Illustratively, reproduced (fig. 8) is a single typeface design called Univers. The design elements are the same throughout, regardless of the slant, thickness, telescoping, etc. of a particular style. The design of any one of the styles would anticipate the other styles. Restated, once the basic Univers design was created in one style, originality could not be claimed for the remainder:

Neither can originality be claimed for machine distortions of a typeface design where the repeating design elements remain essentially the same. On the other hand, there is no logical or legal reason why a sufficiently creative machine distortion of a known typeface should not be copyrightable if the result is a new and original typeface design—i.e., the basic design elements in the distorted version are different from those in the original.

It should also be noted that logical variations within a given typeface design may occur without destroying the overall harmony and beauty of the basic repeating design elements. This point is illustrated below (fig. 9):
All of the letters above are in the same typeface design. But in the instances of the double letters, each fits logically and consistently within the overall design pattern. Thus, it is apparent that minor variations may exist within a typeface design without creating a new design and without destroying the basic design concepts of the particular typeface. Only the basic design should be considered copyrightable.

Concern was expressed at the November 6, 1974 hearing before the Copyright Office whether it is possible to have a classification system so as to permit determination whether a particular typeface design is, in fact, original. Such a classfication system can be established—in fact, several already exist!

Both the British and German governments currently have typeface design classification systems. There is also a well known classification system called Vox which basically

10 point Clarendon

When night falls over the small towns scattered through the hilly Basque country of northern Spain, the villagers huddle in their homes and wait for unwelcome visitors--the agents of the Guardia Civil. And more and more frequently these days, Spain's paramilitary policemen, with their automatic weapons, their flowing cloaks and their patent-leather hats, do indeed come calling. At least 550 Basques have been hauled out of their beds for "questioning" and hundreds more have been picked up on country roads and in city streets. Cars are routinely stopped and searched. Increasingly, there are charges of police torture."The Guardia has created a climate of hatred so intense," protests one Basque nationalist, "that I fear a revolution."

10 point Plantin

When night falls over the small towns scattered through the hilly Basque country of northern Spain, the villagers huddle in their homes and wait for unwelcome visitors--the agents of the Guardia Civil. And more and more frequently these days, Spain's paramilitary policemen, with their automatic weapons, their flowing cloaks and their patent-leather hats, do indeed come calling. At least 550 Basques have been hauled out of their beds for "questioning" and hundreds more have been picked up on country roads and in city streets. Cars are routinely stopped and searched. Increasingly, there are charges of police torture."The Guardia has created a climate of hatred so intense," protests one Basque nationalist, "that I fear a revolution."

fig. 7

10 point Helvetica

When night falls over the small towns scattered through the hilly Basque country of northern Spain, the villagers huddle in their homes and wait for unwelcome visitors--the agents of the Guardia Civil. And more and more frequently these days, Spain's paramilitary policemen, with their automatic weapons, their flowing cloaks and their patent-leather hats, do indeed come calling. At least 550 Basques have been hauled out of their beds for "questioning" and hundreds more have been picked up on country roads and in city streets. Cars are routinely stopped and searched. Increasingly, there are charges of police torture."The Guardia has created a climate of hatred so intense," protests one Basque nationalist, "that I fear a revolution."

10 point Times

When night falls over the small towns scattered through the hilly Basque country of northern Spain, the villagers huddle in their homes and wait for unwelcome visitors--the agents of the Guardia Civil. And more and more frequently these days, Spain's paramilitary policemen, with their automatic weapons, their flowing cloaks and their patent leather hats, do indeed come calling. At least 550 Basques have been hauled out of their beds for "questioning" and hundreds more have been picked up on country roads and in city streets. Cars are routinely stopped and searched. Increasingly, there are charges of police torture. "The Guardia has created a climate of hatred so intense," protests one Basque nationalist, "that I fear a revolution."

fig. 8

classifies typeface designs historically. A discussion of the British and German systems (then in draft form) and of the Vox systems appears in an article entitled "New Approaches To The Classification of Typefaces" by James Mosley, Librarian of the St. Bride Printing Library in London, published in *The British Printer* in March 1960.

The most comprehensive reference work in the classification of typefaces is probably *The Encyclopedia of Typefaces* (W. Pincus Jaspert, W. Turner Berry and A. F. Johnson, London, Blanford Press, 4th Edition, 1970). The British Standard Classification of Typeface appears as part of the preface on "typeface nomenclature and classification." The bibliography in the encyclopedia, at page 406, lists seventeen works concerned with typeface classification.

Another work which the Copyright Office may find useful is *An Atlas of Type Forms* (James Sutton and Alan Bartrom, Lund Humphries, London, 1968), in which the

A A B C C D

E F G H I J

K K L M N O

P Q Q R R S

T V U W W

X Y Z Œ Æ

fig. 9

historical antecedents of the main families of type are concisely explained and lucidly illustrated.

In short, there exists today various classification systems for typeface designs. If the Copyright Office felt inclined to create its own classification system, Mergenthaler would be pleased to work with the Copyright Office in such an undertaking.

VII. Refutation of the Submission by Dan X. Solo Entitled "An Argument in Opposition to Copyright Protection of Printing Types"

At the November 6, 1974, Mr. Dan X. Solo presented the Copyright Office with a printed statement entitled "An Argument in Opposition to Copyright Protection of Printing Types." But Mr. Solo's arguments do not stand the test of examination.

Mr. Solo maintains that the registration of copyright on new designs of the alphabet is unwarranted because the entire matter of design protection for printing types is now and has been for 132 years in the province of the United States Patent Office. Mr. Solo overlooks that the Supreme Court, in *Mazer v. Stein, supra,* and the Court of Customs and Patent Appeals in *In Re Yardley, supra,* have made it abundantly clear that the patent and copyright laws must be read together, and they are not mutually exclusive.

Curiously, Mr. Solo urges that typefaces are primarily functional and not creative, and, therefore, any protection should be sought under the *design* patent laws. He forgets that the design patent laws will not protect utilitarian designs, but only ones which are "new, original and ornamental," 35 USC 171.

Mr. Solo also contends that the registration of the claim of copyright in typeface designs would be unworkable because there is not and cannot be any practical system of standards and guidelines by which typeface designs can be differentiated. But as indicated in the closing remarks of the preceding section on "Originality," not only is it possible to classify typeface designs, but there are presently classification systems in existence. In addition, as was eloquently demonstrated at the Copyright Office hearings on November 6, 1974 by Mr. Ed Rondthaler, one typographer with more than 10,000 typefaces in his library has been able to establish a classification system for locating any particular typeface design by its design characteristics in literally a matter of minutes.

On the point of classification, it is noteworthy that it is considerably easier to classify typeface designs than works of fine arts. Similarly, it is significant that the Copyright Office has never attempted to create a classification system for search purposes of works of fine art. There are no searches to determine "originality," nor should there properly be such. The purpose of the Copyright Law is to provide a cheap and efficient means of registering a claim.

For $6.00, the Copyright Office is not expected to make nor should it make an examination except for the basic formalities and for such matters which are known to be in the public domain. Unlike the Patent Office, the Copyright Office does not have search and examination procedures. The ultimate originality of a particular work has always been left to the courts to determine. So it should be in the case of typeface designs.

As for the argument that the Copyright Office would not have a search procedure available to the public for determining prior registrations of claims to copyright in typeface, there are two answers. The first is that the Copyright Office can establish a classification system for searching, if it felt such a system was necessary. The second is that there are numerous reference works in which typeface designs are reproduced. These are the sources which would be consulted by a typographer in determining whether a particular typeface design is or is not original.

At page 3 of his "Argument," Mr. Solo states:

"To the artist who works with letter forms, this [approach by the Patent Office] may seem unnecessarily severe. He will argue, with some justice, that it is not novelty but subtlety that gives one design superiority over another. He can illustrate how a few quite subtle changes in a limited number of characters can create an entirely new alphabet design. Conversely, he will show that a large number of changes may not substantially alter the visual effect of words and phrases composed in a particular alphabet."
"This is art in its truest sense. To the accomplished letterer, there may be guidelines but there are no rules. The overriding consideration is that the result be harmonious and pleasing within the context of the alphabet's intended function. Such a result comes about through subjective judgment rather than through mathematical precision. Once completed and in use, we evaluate a design in terms of its function. We set it up in words and phrases and paragraphs, to see if it communicates as we want it to. We never make this judgment on the alphabet alone, for that would be meaningless. It is only in practical use that we can determine whether or not a particular alphabet fulfills its intended purpose." (Bracketed matter added).

Subject to one qualification, Mr. Solo appears to

eloquently state the case for registering the claim of copyright in typeface. The qualification simply is that the changes referred to relate to the repeating design elements. It is only when the repeating design elements are changed that there is a new design. As noted in the preceding section on "Originality," there are variations which are permissible within a particular design without altering the basic design concepts.

Mr. Solo has illustrated several examples to demonstrate how difficult it may be for the Copyright Office to determine the registrability of a claim of copyright in a typeface design. At page 6, he depicts samples of Clarendon and Craw Clarendon. Frankly, the Craw Clarendon has left intact all of the definable design features in the original Clarendon, and is merely a reworking of the earlier one, with some modest regularization and thickening. It is doubtful if Craw Clarendon could qualify as an original design over the basic Clarendon.

Similarly, at page 7, Mr. Solo has illustrated various Souvenir versions, as well as Ronaldson and Tiffany. Souvenir is in the public domain, and it is questionable if any of its versions could be characterized as being original for copyright purposes.

The Ronaldson/Tiffany situation is more difficult. Ronaldson is a well established type from Victorian times, and Tiffany is a reworking thereof with the characteristics fairly sharply exaggerated. Tiffany would be a borderline case for copyrightability. There are changes in contrast between the thick and thin strokes, in fit and in serif structure, etc. At most, Tiffany is the kind of problem which should be resolved by the Copyright Office in favor of registering the claim of copyright, and permitting the courts to determine the sufficiencies of the variations.

Mr. Solo then follows at pages 10–12 with changes in slant and condensation. But as noted hereinbefore, mere slant or condensation does not create, by itself, a new typeface. The essential question is whether the repeating design elements in the basic design are continued or altered in the slanted or condensed version.

The samples displayed at page 12 of Mr. Solo's argument are particularly interesting since, in all probability, there would be no question but that the Copyright Office would register the claim of copyright in at least those displays on lines C and E. In any event, Mr. Solo is apparently confusing the meaning of the words shown with the design. The

aesthetic qualities of the typeface are independent of the text for copyright purposes.

There can be little quarrel with Mr. Solo's comment at page 13 that:

"The Copyright Office, if it were to register copyright claims for alphabets, would not be in a position to evaluate the alphabets in terms of prior art. It would serve only as a registry for the artist's claim to originality without establishing that originality through research. It would then be up to the courts to decide which of two or more conflicting claims was justified."

This is exactly as it should be. Contrary to Mr. Solo's suggestion, the copyright registration certificate is merely prima facie evidence. It can be rebutted. As a practical matter, any proficient typographer will be able to readily discern whether a particular typeface design is new or old, or, in the extreme example such as Tiffany, whether it is a truly borderline question.

Mr. Solo suggests at page 14 that the protection of typefaces by copyright will give the manufacturer of a composing machine a leverage to require the purchase of the photocomposing machines. The argument is not germane to copyright law, but to the antitrust law.

Under the antitrust laws, tie-ins are *per se* illegal. It can be said definitively that Mergenthaler will not knowingly violate the antitrust laws. It will be guided by commercial and legal considerations to make its copyrighted typeface available under license at reasonable royalties. On this point, Mergenthaler can only make a profit on its typeface if it is popular. For the typeface to become popular, it must be widely available and reasonably priced.

In the section entitled "Fine Arts versus Functional Design," at pages 15–17, Mr. Solo points out that there are numerous considerations which may go into the design of a particular typeface that were not present in the past. It is a complete answer to this point that none of the disciplines suggested by Mr. Solo in any way derogate from the fact that the actual design of the typeface is an artistic creation. In Mr. Solo's own words, "This is art in its truest sense." (page 3 of Mr. Solo's Argument).

Finally, Mr. Solo's brief history of the piracy of printing types is a fair account of the developments, except that it should be stressed that during the period from approximately

1880 to 1950, less piracy occurred because of the much greater cost of the manufacture of typefaces for the then current large composing machines such as Linotype, Monotype, Intertype and Ludlow, and the corresponding much greater cost for copying the typefaces. With the recent advent of photocomposition equipment, piracy has returned with a vengeance.

It is interesting that in Mr. Solo's history of piracy, he notes the analogy between the copying of foreign typefaces by American type founders with the reprinting in the 1800's of foreign books by the American bookseller. The copyright laws today protect the foreign author from parasitic reprinting without reward to the author. The copyright laws should also proect the designer of original typeface.

VIII. Title I of the Proposed General Copyright Law Revision and Title III Thereof Entitled "Protection of Ornamental Designs of Useful Articles"

At the November 6, 1974 hearings before the Copyright Office, the Register of Copyrights requested comment on the applicability of Title I the general Copyright Law revision to the protection of original typeface designs. Similar comment was requested regarding Title III of the general Copyright Law revision entitled "Protection of Ornamental Designs of Useful Articles" (hereinafter referred to as the design protection bill).

Title I of the proposed general Copyright Law revision[3] seems suited to the protection of original typeface designs. Title III, the design protection section, seems unsuitable for the protection of original typeface designs since that the term of protection is unreasonably restrictive, and it is not clear that the design protection bill actually covers original typeface designs.

The scope of the subject matter of copyright protection under Title I is set forth in Section 102, which provides, in part:

"Section 102. Subject matter of copyright: in general
(a) Copyright protection subsists, in accordance with this title in orignal works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: . . . (5) pictorial, graphic, and sculptural works; . . ."

In Section 101, "pictorial, graphic and sculptural works" are defined to:

"Include two dimensional and three dimensional works of fine, graphic and applied art, . . . plans, diagrams and models."

Title I does not attempt to define graphic and applied art. It must, therefore, be assumed that these terms are used in their normal meaning. Referring to *Webster's Third New International Dictionary, Unabridged,* 1961, at page 105, "applied art" is defined as "employed in the decoration, design, or execution of useful objects." At page 990,

"graphic arts" is defined as "the fine and applied arts of representation, decoration, and writing or printing on flat surfaces together with the techniques and crafts associated with each; as (a) painting and drawing; (b) engraving, etching, lithography, photography, serigraphy, and woodcut; (c) writing and printing and the arts connected with bookmaking and other forms of publication."

In commenting on the definition of "pictorial, graphic and sculptural works," the Senate Committee on the Judiciary stated:

"Correspondingly, the definition of 'pictorial, graphic and sculptural works' carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise everything now covered by classes (f) through (k) of Section 5 in the present Statute, including not only "works of art" in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes and other cartographic works, works of these kinds intended for use in advertising in commerce, and works of 'applied art.' There is no intention whatever to narrow the scope of the subject matter now characterized in Section 5(k) as 'prints or labels used for articles of merchandise.' However, since this terminology suggests the material object in which a work is embodied rather than the work itself, the bill does not mention this category separately."
"In accordance with the Supreme Court's decision in *Mazer v. Stein,* 347 US 201 (1954), works of 'applied art' encompass all original, pictorial, graphic and sculptural works that are intended to be or have been embodied in useful articles, regardless of factors such as mass production, commercial exploitation and the potential availability of design patent protection."[4]

Whether original typeface designs are considered as "applied arts," or as "graphic arts," it is manifest that they are included within the definition of copyrightable subject matter in the general Copyright Law revision.

The term of copyright in typeface under Title I is eminently correct. As provided in Section 302 for works created after January 1, 1975, the term of copyright endures for the life of the author and fifty years after his death, or, in the case of a work for hire, for a period of seventy-five

years from the date of first publication, or a term of one hundred years from the year of its creation, whichever expires first.

The statutory notice requirement of Title I is also suited to protecting original typeface designs.

A statutory form of copyright notice is still required. However, judicial sanction is given to permitting an abbreviation or generally known alternative designation in lieu of the name of the copyright owner (Section 401(b) (3)).

More significantly, Section 405(a) makes clear that the notice requirements of Section 401 are not absolute, and, unlike the present law, the outright omission of the copyright notice does not automatically forfeit protection and throw the work into the public domain. Under the proposed law, a work published without any copyright notice would still be subject to statutory copyright protection for a least five years, whether the omission was partial or total, unintentional or deliberate (Section 405(a) (2)).

Of special interest is Section 405(a) (3) which militates against loss of copyright where the notice is omitted in violation of an express requirement in writing by the copyright owner. Presumably, the sale of a grid bearing a copyrighted typeface could be made with the written condition that the purchaser always use the statutory notice of copyright in making copies of characters from the copyrighted typeface. The failure of the purchaser—i.e., the type setter—to follow this requirement would not result in a loss of copyright in the typeface, as a whole, by the claimant, who would still be protected from having the entire typeface copied by a competitor. On the other hand, if the type setter omitted the claimant's notice, Secion 405(b) expressly provides that an innocent infringer incurs no liability for actual or statutory damages for any infringing acts committed before receiving actual notice that registration for the work had been made under Section 408, if he proves that he was misled by omission of the notice.

At the November 6, 1974 hearings before the Copyright Office, concern was expressed over the right of reprint houses to reproduce certain copyrighted works. If the work sought to be reproduced bears no notice of copyright covering the typeface in which the work is set, the reprinter would appear to have immunity from infringement under Section 405 as an innocent infringer. Moreover, it is significant that Section 108 gives an absolute right of reprinting in limited numbers for limited purposes—specifically, for

archival reproduction or replacement of a damaged copy by a library or archive (Section 108(b) (c)). In view of the limitation in Section 108(h), a reprinter would not have the right to reprint out-of-print works which are set in a typeface for which there is a subsisting copyright unless the reprinter could establish "fair use" under Section 107 or "innocent infringement" under Section 405.

Section 113 relates to the scope of the exclusive rights in pictorial, graphic and sculptural works. Sub-section (a) provides that the exclusive right to reproduce a copyrighted graphic work includes the right to reproduce it in or on any kind of article, whether useful or otherwise. Sub-section (a) (1) further provides that the copyright owner's rights in a graphic work that portrays a useful article is neither greater nor lesser than the rights which the owner held as of December 31, 1974 under Title 17, U.S. Code, the common law, or the statutes of a state. But this limitation in sub-section (a) (1) does not appear to apply to typeface designs.[5] It applies only when the copyrighted work portrays a useful article as such, for example, a drawing of an automobile vis-a-vis the exclusive right to make automobiles of the same design, see Senate Subcommittee on Judiciary report, No. 93–983, page 138. In the case of typeface, what is being portrayed is the typeface which, of itself, is the work of art, rather than a picture of something else.

Sub-sections (b) and (c) of Section 113 give the owner of copyright in a graphic work which is utilized in an original ornamental design of a useful article an option to seek protection under the provisions of Title III of the Copyright Law revision, in which event copyright terminates with respect to its utilization in useful articles. However, if the copyright owner does not obtain registration under Title III, his copyright in the graphic work continues in all respects under the general copyright law.

Turning to Title III, the design protection section intended for the protection of ornamental designs of useful articles, its preparation and purposes have been the subject of numerous hearings.[6] It is comprised of Sections 301–335. As stated by the Majority Report of the Committee on the Judiciary, at page 211:

"The purpose of the proposed legislation, as amended, is to encourage the creation of original, ornamental designs of useful articles by protecting the authors of such designs for a limited time against unauthorized

copying. The title . . . is intended to avoid the defects of the existing copyright and design patent statutes by providing, simple, easily secured and effective design protection for the period of five years, or, if renewed, a period of ten years, under appropriate safeguards and conditions."

In reviewing the hearings on the design protection bills, it is interesting that the arguments of the proponents of the bills closely parallel those in favor of the registration of the claim of copyright in typeface. The arguments of the opponents of the design protection bill are markedly similar to those objecting to copyright in original typeface designs.

One fact is clear from the prior design protection bills and the hearings thereon—none of them considered typeface, as such.

If applicable to original typeface designs, the design protection bill could provide an excellent avenue for their protection, with the singular exception that the term of protection is too short! The difficulty is that it is unclear whether original typeface designs come within the definition of matter covered by the design protection bill.

Section 301 provides:

(a) the author or other proprietor of an original ornamental design of a useful article may secure the protection provided by this title upon complying with and subject to the provisions hereof.
(b) for the purpose of this title —
(1) a "useful article" is an article which in normal use has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article which normally is a part of a useful article shall be deemed to be a useful article.
(2) the "design of a useful article," hereinafter referred to as a "design," consists of those aspects or elements of the article, including its two dimensional or three dimensional features of shape and surface, which make up the appearance of the article.
(3) a design is "ornamental" if it is intended to make the article attractive or distinct in appearance.
(4) a design is "original" if it is the independent creation of an author who did not copy it from another source.

The hearings on the design protection bill indicate that

its purpose is to cover such things as wallpaper, drawings converted into three dimensional articles or drawings used decorativly on three dimnsional articles, furniture, toasters, coffee pots, carpets, and the like. It is not intended to cover something which is at all times a work of art as the term is now interpreted by the Copyright Office; see Hearings of August 15–17, 1961 before the Senate Committee on the Judiciary, 87th Congress, 1st Session, page 168.

It is Mergenthaler's position that an original typeface design is a work of art, and stays at all times a work of art, no matter what use is made of it. Unlike the cartoon which may be reproduced on an article of furniture, or the works of art which may be incorporated on wallpaper, the typeface designs are not converted to some other utilitarian article. They always remain exactly what they are.

On the negative side of Title III, it is arguable that typeface cannot meet the statutory definition of an "useful article" on the grounds that its intrinsic, utilitarian function is to portray the appearance of an article—i.e., the letter form—or to convey information [Section 301(b) (1)]. Either of these aspects would appear to defeat the right to secure protection for original typeface designs under the design protection bill. The hearings on the bill have offered little guidance in this area.

Assuming, arguendo, that an original typeface design is a "useful article" as defined in Section 301(b) (1), then the definitions of "design" and "ornamental" in Section 301(b) (2) and (3), accurately describe the protectible subject matter of an original typeface design.

Section 302 provides that protection shall not be available for a design that is:

"(a) not original;
(b) staple or commonplace, such as a standard geometric figure, familiar symbol, emblem or motif, or other shape, pattern, or configuration that has become common, prevalent, or ordinary;
(c) different from a design excluded by sub-paragraph (b) above, only in insignificant details or in elements which are variants commonly used in the relevant trades; or
(d) dictated solely by a utilitarian function of the article that embodies it;
(e) composed of three dimensional features of shape and surface with respect to mens', womens', and chil-

drens' apparel, including undergarments and underwear."

Presumably, the definition of "original" in Section 302(a) is the same as the term has been defined by the courts under the present Copyright Law. If this assumption is correct, this sub-section should not pose any impediment to the protection of original typeface design. The same cannot be said of Section 302(b). The very essence of typeface is that it be a *familiar* motif, shape, pattern, or configuration, irrespective of the design elements which are added to it.

Equally detrimental to protection for original typeface designs under Title III is Section 302(c) since many of the elements with which a particular typeface is designed are variants of others which may have been commonly used. The distinction is that an original typeface design is a new combination of old elements which gives an entirely new appearance to the typeface, or it may be an assemblage of entirely new elements. To the extent that the design elements incorporated in a particular typeface design are old, the mere fact that they are combined in a new form appears immaterial under Section 302(c), which would deny protection for the design. Thus, even assuming that typeface is a "useful article" within the definition of Section 301(b) (1), protection would apparently be denied under Section 302(b) or (c). In this circumstance, the design protection bill offers little comfort to the designer of original typeface.

Another shortcoming of the design protection bill as it applies to original typeface designs is the term of protection. Under Section 305, the term is five years, renewable for an additional five year period. As indicated earlier in this statement, typeface has an enduring life. The most appropriate term of protection is believed to be seventy-five years.

As a practical matter, the market for typeface is just being established by its tenth anniversary date. There would be a reasonable expectation of at least some return if the protection for typeface were extended to fifteen years.

At a very minimum, the protection for original typeface designs must be fifteen years! In this regard, it is significant that Article IX of the Vienna Treaty provides:

Article IX—Term of Protection
(1) the term of protection may not be less than fifteen years.

(2) the term of protection may be divided into several periods, each extension being granted only at the request of the owner of its protected typefaces.

The present ten year limitation for protection in the design protection bill precludes the United States from adhering to the Vienna Treaty for the protection of typefaces under the provisions of Title III.

If the Copyright Office believes that the protection for original typeface designs should be under the design protection bill, the Copyright Office is urged to have the bill clarified so as to cover typeface in the definitions and exclusions. Further, it is urged to have the term of protection modified to a minimum of three (3) successive five year terms so as to qualify under the Vienna Treaty.

If the defects in the design protection bill in connection with original typeface designs can be cured, there are other features of the bill which are particularly well suited to the protection of typeface—namely, the notice provisions and the infringement provisions.

Section 306 requires that a design for which protection is sought must have a specific statutory notice located so as to give reasonable notice of design protection "while the useful article embodying the design is passing through its normal channels of commerce," Section 306(b). So long as the proprietor of the design complies with these provisions, protection is not affected by the removal, destructions, or obliteration of others by the design notice on an article. As applied to typeface, this would mean that a proprietor of a typeface would only have to put the notice on either the drawings which he licenses or on the grids bearing the protected design. The fact that others omitted the design would be immaterial to the protection. This is a significant improvement over the notice provisions under the current Copyright Law and even under the proposed general copyright revision.

Section 307 protects an innocent infringer of the protected design without the required notice until he receives written notice of the design protection. Assuming that a particular book were set in a protected type design, and that the design proprietor's notice was not repeated in the book, Section 307 would permit a reprinted to copy the book without the design proprietor's permission unless the reprinter had actual notice of the design proprietor's claim of protection in the typeface design.

The foregoing points are believed to highlight the significant aspects of the design protection bill as it applies to original typeface designs. Further discussion of the remaining provisions does not appear to be necessary.

In summary, Mergenthaler believes that original typeface designs are clearly intended to be covered as copyrightable subject matter under Title I the general Copyright Law revision. As Title III or the design protection section is presently drafted, its definitions and exclusions appear to preclude original typeface designs from protection thereunder; and the term of protection is manifestly too short. Accordingly, it is doubtful if a copyright proprietor of an original typeface design would wish to avail himself of the option under Section 113 of the general Copyright Law revision to seek protection under Title III. On the other hand, if the deficiencies in the definitions, exclusions, and term of Title III were corrected, it might prove to be a very viable form of protection for original typeface designs in view of its more realistic notice requirements.

IX. Summary of Responses to Copyright Office Questions

In the September 10, 1974 *Federal Register* notice, the Copyright Office specifically requested comments in five areas. These questions were responded to in depth at the oral hearing on November 6, 1974 in the statements on behalf of Mergenthaler. Written copies of these statements have been submitted to the Copyright Office and are incorporated herein by reference. Nevertheless, for the purpose of completeness, the responses to the five areas will hereinafter be summarized.

1. Whether type fonts, as useful articles, can incorporate original design elements capable of being identified as "works of art" within the scope of the present copyright statute.

The answer to this query is a resounding "Yes." All letter forms are useful articles to the extent that they are recognizable and convey information. But all of the letter forms in the myriad numbers of differing typefaces in the public domain differ in one significant way—i.e., their decoration. These decorative differences are subtle to the untrained eye but obvious to the professional. It is that decoration which is original with the designer that is the proper subject matter of copyright protection. The useful article or utilitarian concept is simply not relevant to the question of the copyrightability of typeface, see *Mazer v. Stein, supra,* and *In re Yardley.*

2. The distinctions, if any, between calligraphy, ornamental lettering, and typeface designs for copyright purposes.

For copyright purposes, there are no distinctions.

Calligraphy is defined in *Webster's New International Dictionary* as: "fair or eloquent writing or penmanship; writing as a decorative art." By definition, calligraphy is necessarily artistic and original, and is clearly copyrightable subject matter within the meaning of "writings" as used in the Constitution and in the Copyright Act of 1909, Section 4.

Ornamental lettering generally refers to lettering whose principal purpose is to ornament. By definition, it is copyrightable subject matter so long as it is original.

The important distinction between ornamental lettering and typeface is that ornamental lettering is not suited for use in preparing a page of text. Its design is generally

dependent upon the particular object and space in which the ornamental lettering is used.

Typeface is used for setting a page of type. It includes all the letters and alphabets, and their accessories, such as accents and punctuation marks, numerals and other figurative signs, etc. which are intended to provide means for composing texts by any graphic technique.[7]

The important aspect of typeface is that it is a consistent repeating of design elements in the characters which requires that the designs of the characters and all combinations must be considered.

Restated, the net result of ornamental lettering is to produce one or only a few words which are ornate and beautiful; while the net result of well designed typeface is to produce a beautiful page of type.

The design of typeface is necessarily an act of intellectual effort to decorate what are basically customary letter forms having a utilitarian purpose. It is the decoration of these letter forms which is believed to be the proper subject matter of copyright protection.

3. Whether a typeface design can, by its nature, incorporate the degree of originality and creativity necessary to support a copyright.

As indicated in the preceding law section, "original" has been defined to mean little more than the particular work owes its origin to the author and that the author contributed something more than a merely trivial variation, *Bell v. Catalda, supra.* In her comprehensive study, Miss Oler noted in connection with standards of copyrightable authorship for works of art, ". . . A review of these comments indicates that courts for the most part determine the registrability of works on a case-by-case basis, and that they generally affirm the Holmes' view that originality is a quantitative standard which requires that the author adds something of his own, something which has not been copied," page 28 of the Oler study. Miss Oler further noted that the court opinions ". . . show a judicial willingness to recognize the copyrightability of original arrangements of substantial amounts of public domain elements, where the materials lend themselves to a variety of combinations or methods of presentation, and where the arrangement in question is recognizably different from those standard to the trade," Oler Study, page 34.

In the case of typeface, the difference between one and

another is the decoration of the skeletal letter forms and characters. To the extent that the decoration is old, it cannot be claimed to be original. To the extent that it is a combination of design elements not heretofore appearing together, the design is necessarily original and the designer's own. He has added something more than trivial variations. He has created a copyrightable work of art.

4. Whether, for purposes of copyright registration, workable standards can be established for distinguishing "new" designs based on previously existing typefaces from mere copies or minor variance of earlier designs.

Not only can standards be established for classifying typefaces, but, as indicated in the preceding section on originality, there are a number of works in existence on typeface classification. Since typeface design is a structured and disciplined art form, it is easier to define standards here than in the field of fine arts.

In any classification of typeface designs, it would be necessary that they be considered by a proficient typographer rather than a mere layman. The differences in design are subtle to the layman, but clear to the professional typographer. Since typeface designs are normally purchased by skilled typographers, the differences between them should also be considered by skilled typographers. Such a skilled typographer could readily determine whether a particular typeface design is a mere copy or a minor variant of an earlier design, or whether it is, in truth, original. There will always be borderline cases such as the Ronaldson/Tiffany case. But these will be the exceptions, rather than the rule.

Having responded to the Copyright Office query whether classification standards can be established, the question is presented to the Copyright Office why it believes it necessary to have such a classification system. The Copyright Office maintains no other subject matter indices that would be comparable to such a typeface design classification system.

5. Assuming the potential copyrightability of certain typeface designs, the practical means of compying with the formal requirements of the Copyright Law as to notice, deposit, and registration.

The practical means for complying with the notice requirements of the Copyright Law would be to place the statutory notice of copyright on the original art work and the copies thereof which are licensed to other grid manu-

facturers, as well as to put the copyright notice on the grids of the copyright claimant and his licenses under the copyright.

The deposit with the copyright application could be copies of the actual art work. In the case of an unpublished typeface design, a single copy of the art work would be filed; after publication; two copies of the art work would be filed. Alternatively, as an optional deposit after publication, copies of the grid bearing the complete typeface design might be filed.

With regard to the application form itself, Form G appears adequate, without any changes. If the Copyright Office felt it necessary, Form G could be expanded to include check-off boxes in which the claimant can classify the typeface design by historical classification, and by the basic elements, such as stroke, angle, etc. The Copyright Office might also expand Form G to require the claimant of copyright in a typeface design to identify the principal distinguishing characteristics of the particular typeface for which registration is sought. This would not create any major problem for a typeface designer.

X. Conclusion

The design of typeface involves great effort, expense, intellectual effort and originality. As such, it is proper copyrightable subject matter under the present Act. The Copyright Office is urged to change its regulations to permit the registration of the claim of copyright in *original* typeface designs. In making such a change, the Copyright Office will be merely conforming to the law and furnishing a basis to implement the Vienna Treaty.

If there is any doubt on the registrability of the claim of copyright in original typeface designs, it should be resolved in favor of registration so that the propriety of the registration can be tested on the merits in a court.

Further, by recognizing the claim of copyright in *original* typeface design, the Copyright Office will be enshrining the constitutional mandate of "prompting the progress of . . . useful arts." It cannot be disputed that typeface is useful, but it is also engrafted with originality and applied design. Thus, the emphasis must be on originality which encourages the growth of creativity. The public gains from the creativity. The only loss is that one may not literally copy without authorization during the term of copyright.

In *Mazer v. Stein,* Justice Reed noted:

"The Copyright Law, like the patent statutes, makes reward to the owner a secondary consideration. However, it is 'intended definitely to grant valuable, enforceable rights to authors, publishers, etc. without burdensome requirements'; 'to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.' " . . . "The economic philosophy behind the clause empowering Congress to grant patents and copyright is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'science and useful arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

By changing its regulations to recognize the claim of copyright in original typeface designs, the Copyright Office will take a great step forward to encourage the development of original typeface design "of lasting benefit to the world" and "to advance public welfare" through the "encouragement of individual effort by personal gain."

Finally, there is no justification for delaying a decision on recognizing the claim of copyright in original typeface designs merely because of the *Storch* case, in which the copyright claim in typeface is obliquely raised and which may never be decided, or because of the pending general Copyright Law Revision, which has been pending for nearly 10 years. The Register is, therefore, requested to reach an early decision on changing the Copyright Office regulations. While it is believed that the decision should be in favor of change, even an adverse decision would be preferable to none at all, if for no other reason than to give vitality and effect to the procedure of holding hearings on proposed regulation changes.

Respectfully submitted,
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[1]See Vienna Agreement For the Protection of Typefaces and Their International Deposit, dated June 12, 1973. Article 2.

[2]See n.15 of the Copyright Office Study entitled "The Copyrightability of Typography" and Regulation No. 202.1(a), dated July 1971 and September 1972. (Docket No. T-7) by Harriet L. Oler.

[3]Title I of S.1361, 93rd Congress, 2nd Session.

[4]Page 106 of the Majority Report of the Senate Committee on the Judiciary on the Copyright Law Revision, 93rd Congress, 2nd Session, Calendar No. 946, Report No. 93–983, July 3, 1974.

[5]If this limitation in subsection (a) (1) applies to typeface designs, then the registrability of typeface designs under the present law might be critical to a determination of what rights are carried over and thereby afforded to the owner of a typeface copyright under Title I of the revision bill. As a result, if the Copyright Office fails to amend section 202.1(a) of its Regulations to permit registration of typeface designs under existing law, then such prior practice of refusing registration would probably be imported into section 113(a) (1) of the revision bill as to deny copyrightability to typeface designs under Title I. Presumably the Copyright Office would not want to thereby prejudice the rights of typeface designers under the copyright revision bill, but such requires a choice between an amendment of Section 202.1(a) of the copyright Regulations to permit registration of such designs or an amendment to Section 113(a) (1) of the copyright revision bill.

[6]Hearings before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, 86th Congress, 2nd Session on S.2075 and S.2852, dated June 29, 1960; Hearings before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, 87th Congress, 1st Session on S.1884, dated August 15–17, 1961; Hearings before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, 89th Congress, 1st Session on S.1237, dated July 28, 1965.

[7]Vienna Treaty, see Footnote 1.

New Approaches to the Classification of Typefaces

By James Mosley, MA

The detailed review of recent typeface classification proposals published on the following pages appears at a time when the outlook for both national and international agreement on the subject appears to be considerably brighter than for many years past. It is indeed a field in which an authoritative standard offers a number of obvious advantages, not only in terms of specimen book compilation and technical education, but also as a means of clarifying misunderstandings in printing import and export transactions.

This review has been prepared by James Mosley (Librarian of the St Bride Printing Library) for the guidance of a British Standards Institution sub-committtee which is at present studying the subject, and of which he is Chairman. It is due to be formally submitted to a meeting of the sub-committee this month (May) and its prior publication has been undertaken with the sub-committee's concurrence in order to provide an opportunity for readers' comments and suggestions. Any correspondence on the subject should be addressed to Mr Mosley (at The St Bride Printing Library, Bride Lane, London EC 4) as soon as possible.

The sub-committee is identical in composition to that which was responsible for the compilation of the British Standard for Typeface Nomenclature (BS 2961:1958) with the replacement of W. Turner Berry by James Mosley. Its present membership comprises (in addition to Mr Mosley) Mrs Beatrice Warde, Stanley Edwards, Caspar Mitchell, Charles Rosner, Walter Tracy and the Editor of the BP. An invitation has also been sent to the Association of Teachers of Printing & Allied Subjects to nominate a representative.

It was originally anticipated that the Standard for Typeface Nomenclature would include a classification, but the sub-committee felt that the controversial nature of this aspect of the subject demanded longer-term consideration. Meanwhile, the publication of a German Draft Standard Classification last year has emphasised the need for clarification of national viewpoints as a prior condition of some measure of international agreement. There are, in fact, grounds for the belief that a suitable British Standard established in the near future might receive considerable support abroad and provide a basis for world standardisation in terms of the latin alphabet, with national or regional addenda covering the non-latin requirements, and including the German fraktur forms.

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SINCE the last World War, and especially during the last five years, a number of distinguished type designers and typographers have made suggestions for revising the headings under which types are usually classified, and have attempted to put forward a logical plan which would enable the printing industry of one country, or of the whole of Europe, to use a common classification terminology. The main reason given for the schemes which have been offered is the illogicality of the terms now in use, which hinders the printer in discussing his work with the customer and the teacher of typography in explaining to his students the tools of their trade.

The design of a printing type is determined by a great many factors – some historical, some prompted by the nature of the printing process to be used, and some deriving arbitrarily from the dictates of fashion. No one has suggested that the standardisation of terminology in type design can be as neatly achieved as the International Standard of Paper sizes or that it can produce such obvious economies in the working of a printing office. But the discussion which the schemes have provoked has in itself made printers, designers and print-buyers more aware of the confused foundation of the terms now in use.[1] Moreover, two of the schemes have reached a point where they may be more or less officially adopted. The 'Vox Classification' proposed by Maximilien Vox in 1954 has already been used for the arrangement of type specimen books. The proposals of a number of German writers were the basis of the Draft Standard DIN 16 518[2] issued during 1959 by the Deutsche Industrie Normen-Ausschuss, the German equivalent of our own British Standards Institution.

Some powerful reasons can be found for examining our own terminology now. One is that the output of new types, which grew after the war, has recently slackened. There is an opportunity for taking stock of the range of types available to the printer and arranging it in a rational manner. Another is that the wider use of filmsetting will remove the major obstacles to the introduction of faces of foreign origin – namely the expense and difficulty of importing metal type and the incompatibility of different point-systems and type-heights. It also seems likely that any future European

economic unit will be encouraged to standardise its terms so that exact equivalents can be found in each language. This is so important in international correspondence concerning printing that whatever system gains favour during the next few years has a chance of general adoption.

The names of groups of printing types now used in Europe and America have grown haphazardly over many centuries with the introduction of each new style of design. The name given to the style may be descriptive of its appearance (black-letter, sans-serif, grotesque), refer to its origin (roman, italic) or to circumstances which were only valid at the time of its introduction (modern face, old style). To an apprentice meeting them for the first time they have little obvious meaning. Black-letter is no longer, as it was once, the boldest type to be found in the printing office. A type without serifs no longer appears as 'grotesque' to a printer or to his customer, as it may have done in the early nineteenth century, and the use of the words 'modern' and 'old-style' raise questions about the use of historic forms of printing types which it is the business of the historian to answer. The two factors which first increased the number of styles available in every printing office and so brought about the present rough and ready classification were the introduction of types intended solely for display, and the deliberate revival of historical styles, in the nineteenth century.

Thus Southward, in his *Practical Printing* (1898)[3], distinguishes between the two main groups 'body' or text types and 'fancy' types used for display matter. Text types are subdivided into six groups. The first is the 'modern face roman' ('When ordinary roman is named this is the face that is usually understood'). It is followed by 'old style' or 'old face' and 'modernised old face, commonly called old style'. The three other text types named by Southward are special types, used at that time by only a few printers. One of these is of particular interest, as it has added a category to our current classification. This is the 'Jenson style roman', usually a more or less accurate copy of William Morris's 'Golden' type. Southward was less confident in classifying the 'fancy types'. 'It is,' he says, 'impossible to avoid overlapping, especially as in the search after novelty it has become a common practice

to mix styles. Hence any system must be open to criticism and capable of improvement. In order to construct a system of classification it is necessary to consider (1) The essential forms of the characters; (2) The manner in which these have been modified and decorated – if not distorted.' Southward himself did not attempt to construct any such classification, and the names which he gave to display types are those still in general use today: Ionic or Clarendon, Sans-serif, Doric or Grotesque, and so on.

Southward listed only the more usual types which an apprentice would be likely to meet in a printing office in 1898. Theodore Low de Vinne, the New York printer, laid the foundations of a study of printing types with his *Plain Printing Types* (1900).[4] It is the first book on printing in which a wide variety of types from American and European founders was brought together, and provided with an accurate historical commentary. De Vinne's classification is that of the American typefounder of his day. The terms, with few exceptions, are those in use at that time in England: *Roman*, *Italic*, *Script*, *Black-letter*, *Gothic*, *Italian* ('a roman in which the positions of hair-line and thick-stroke have been transposed'), *Title* or *Fat-face*, *Antique* and *Ornamentals*. His analysis of the different styles of type is both structural and functional. He distinguishes 'old style' from 'modern face' both by their serif-treatment and by the printing conditions for which they were designed, and his display of the various forms of these styles is perhaps the most comprehensive that has ever been gathered together. Some of these types bear names with vague historical associations. De Vinne was able, from his own wide knowledge of type forms, to say how far they could be regarded as reproductions of their originals, but he did not arrange them in historical order. His book is essentially a guide to types available to the printer rather than a history of the development of type designs.

A purely structural or 'morphological' division of type forms was devised by Henry Lewis Bullen, Librarian to the American Type Founders' Company. In a series of articles[5] contributed to *The Graphic Arts* in 1911 and 1912 he emphasised the importance of serif-treatment in type-design and his examples, like

those used by De Vinne, were drawn from contemporary types. Most of these, naturally enough, were drawn from the resources of the American Type Founders' Company itself. Bullen attempted little revision of the terminology in current use. Fully acknowledging the imperfections of the ambiguous terms, such as *gothic* and *antique*, he was inclined to defend the use of terms with architectural associations: *ionic*, *doric*. This was partly on the analogy with the orders of columns in Greek and Roman architecture, where doric is both the simplest and the most primitive style, and all other orders may be regarded as variations of its original shape. Sans-serif is the counterpart of the doric column, and the variation of stroke-thickness and the use of serifs produces a certain style of letter.

The classification of types by their serifs occurred about this time, apparently independently, to the French typographer F. Thibaudeau. In 1903 he had devised a classification for the comprehensive historical material of the foundry of Georges Peignot. Searching for a single feature in each type which could be used for the basis of a classification, he came to the conclusion that the form of the serif was the only one which could be used with any consistency, and expounded his system in his *La Lettre d'Imprimerie*[6] and *Manuel Français de Typographie Moderne* (1924)[7]. He proposed four main divisions: *Antique* (Sans-serif) 'derived from Phoenician inscriptions', *Egyptienne* (Egyptian) 'derived from Greek inscriptions', *Romain Elzévir* (all old faces) and *Romain Didot* (all modern faces). Subdivisions could be (and were) made to each of these groups, but the four main characteristics were given as: without serif, square serif, triangular serif, fine horizontal stroke. The merits and limitations of his scheme can be seen from the generously illustrated historical sections of his books, where he discusses all his historical examples with special attention to the principles set out in his classification.

One should be careful not to judge some of these schemes wholly by the terms which have been proposed for the divisions. In most arts, historical styles are the concern of the art historian. He takes his terms either from the references, often contemptuous, made to styles when they have become outmoded (such as

'gothic' and 'baroque') or invents new terms which try to convey something of the spirit which influenced all the arts in a given period (such as 'renaissance', 'classical', 'neo-classical' and 'romantic'). The historian of printing finds a nomenclature already made, and usually accepts as much of it as he can.

Daniel Berkeley Updike set a new standard of typographical scholarship in his *Printing Types* (1922)[8], whose intention was 'to supply a basis for the intelligent appreciation of printing types through the study of their history, forms and use'. He traced, in greater detail than any previous writer, the differences between type faces in different countries at the same period. His account describes not only the innumerable special circumstances which influence type design in one country, but the movement towards a 'modern' type which was felt in every European country during the eighteenth century. He remarks, in his chapter on 'Classical Types', that these French and Italian types, especially those of Didot and Bodoni, had their origin both in 'special tendencies' in typography and in political and artistic movements. 'Classical' is a term which suggests a parallel with both the other arts of the period and with a whole range of political and moral ideas. Updike's use of a term with such wide associations encouraged others to see the ornaments and type used by printers as a reflection of influences outside the printing trade, a suggestion which has been developed by the authors of some later classifications. Another of Updike's terms, which has been generally accepted in this country, is equally significant. The 'transitional' types which are neither old faces nor fully-blown modern faces make an historical approach to type inevitable. One cannot talk of a transition without knowing what went before it – nor what became of it.

In the year that Updike's work was published, 1922, The Monotype Corporation Ltd accepted the plan of Stanley Morison for the cutting of a new range of book types. Typographical reform was in the air, and on the principle that 'the way to learn to go forward was to make a step backward'[9] the new types were selected from historical forerunners. The possibility of accurately reproducing the types of Garamond and Granjon, of Fournier and Didot, Baskerville and Caslon,

and indeed the very existence of the great composing machine manufacturers, had been made possible by L. B. Benton's famous pantographic punch-cutting machine. The American Type Founders' Company, the Nebiolo company of Turin and Peignot of Paris were among the earliest typefounders to make use of the opportunity which enabled all the important types of the past to be reproduced from their printed impressions. The types cut for composing machines have made familiar the names of printers and punchcutters which were known only to the scholars, and has encouraged an approach to printing types among the teachers of printing which is largely historical.

This completion of the historical picture has overburdened the old terms until they are no longer regarded as adequate. The proposals which follow are based in part on the work of the scholars who have thrown new light on the development of printing types. In a paper read to the Bibliographical Society in 1935[10], Mrs Beatrice Warde proposed a classification of typefaces intended for continuous text composition which would take recent scholarship into account. It is purely morphological: that is, the letterforms are arranged according to their superficial shape and to the tool which has produced or influenced them. The old terms are used only to add information after the type has been classified. Thus a 'Garamond' type is a bias-stress roman type of the Aldine Group (a term which replaces 'Old Face' for those types in a direct descent from the Aldine roman which were cut until the end of the eighteenth century). Many of the terms which were proposed here have been included in the British Standard *Typeface Nomenclature* (BS 2961: 1958).

New types produced since the last World War, and the acceptance by German printers of roman type for normal text setting in place of Fraktur, have stimulated interest in a classification which would be universally applicable. The scheme proposed in 1954 by Maximilien Vox is strikingly simple in form[11]. Criticising Thibaudeau's over-rational scheme, he proposed ten groups: *Médiėves*, *Humanes*, *Garaldes*, *Réales*, *Didones*, *Simplices*, *Mécanes*, *Incises*, *Manuaires* and *Scriptes*. These names were chosen for easy pro-

nunciation and translation, but M. Vox has since said that they could equally well be replaced by numbers for the essential feature of his classification in his group of ten, and later nine, divisions. The category of *Médièves* (black-letter) was subsequently added to the *Manuaires* and the name *Linéales* substituted for that of *Simplices*. This is the present classification:

Manuaires 'Drawn letters, or those where the influence of the hand is evident.'

Humanes 'Types in the tradition of the early humanistic romans of the fifteenth century', *i e* 'Venetians'.

Garaldes (A combination of the names of Garamond and Aldus) 'The purest renaissance style', that is, the types in the Aldine tradition, until about 1700.

Réales 'An essential section, until now confused with the 'elzévirs' (French Old Style) or 'didots'. So called because they represent the development of monarchical centuries towards an architectural letter, with a systematical differentiation of thick and thin strokes.' M. Vox's description applies more to French types than their English equivalents, but it corresponds closely to our 'transitional'.

Didones (A combination of the names of Didot and Bodoni). All types included in the English category 'modern face'.

Linéales (formerly *Simplices*) Sans-serifs (but not necessarily with strokes of equal weight).

Mécanes 'Egyptians' with slab-serifs.

Incises A new definition for Thibaudeau's category '*latines*', which includes not only nineteenth century 'Latin' types, but letters with slight serifs showing the effect of a chisel or engraver's burin.

Scriptes Calligraphic reproductions, current writing.

Types which have characteristics of more than one group can be defined by a combination of terms. M. Vox suggests that Cheltenham should be classed as an *Humane-Mécane*. A date can be added as an extra qualification: An old style of 1860 is a *Nineteenth Century Garalde*, Rockwell is a *Modern Mécane*. 'Bold' and 'Ornamented' are also used in this way as a secondary terminology.

*

médièves

Humanes

Garaldes

Réales

Didones

Simplices

Mécanes

Incises

manuaires

Scriptes

The original models (hand drawn but based on typefaces) of the Vox Classification of 1954

M. Vox's classification aroused both interest and controversy when it was reported in this country in 1954. Although it was generally acclaimed as an original contribution to a difficult subject, it was objected, for example, that the category *Garaldes* was too wide in its scope, and that some of the terms (notably *Réales*) were difficult to grasp and to translate. A memorandum considering some of the problems encountered in applying the Vox classification was produced by Professor G. W. Ovink of the Amsterdam Typefoundry in 1955[12]. In a sympathetic examination of the classification he criticised chiefly the variety of points of view from which each category was considered, some being based on type history and some on the construction of the characters. He criticised also the vagueness of the terms *Manuaires* and *Incises* and the excessive size of the *Scriptes*. He offered a tentative list of translations into English, German and Dutch, the first of which is given here: *Manualist*, *Humanist*, *Garalde*, *Regalist*, *Didone*, *Mechanist*, *Lineal* and *Script*. Professor Ovink was unable to find a satisfactory equivalent for *Incises*.

Some modifications of M. Vox's classification have been proposed. Aldo Novarese, the Italian type designer and typographer for the Nebiolo typefoundry, included a classification in an article on compatibility of different faces[13]. His ten divisions correspond to some extent with Vox's original ten, and he suggests English, French and German equivalents. His Italian and English terms are given here:

Lapidari (Lapidary) Like Vox's *Incises* these are types which show the effect of the chisel, being primarily types based on roman inscriptional capitals, but including also the 'latins'.

Medioevali (Medieval) All forms of gothic letters are included in this category.

Veneziani (Venetian) This is the equivalent of Vox's *Humanes* and *Garaldes*.

Transizionali (Transitional) 1693–1775. Vox's *Réales*, Caslon and Baskerville, Fournier and Fleischmann.

Bodoniani (Bodonian) Vox's *Didones*.

Scritti (Handwriting) Vox's *Scriptes*.

Ornati (Ornamented) All types bearing applied ornament are included in this category.

Egiziani (Egyptian) Vox's *Mécanes*.

Lineari (Linear) Vox's *Linéales.*
Fantasie (Fancy) The types shown under this heading are those in which the designer has rejected precedent in order to create a striking form. The examples given are chiefly of the late nineteenth century and the *art nouveau* movement.

A further classification, by Giuseppe Pelletteri[14] combines certain features of the Vox scheme with a system of identification by serifs. Each of his ten categories is numbered, and subdivisions are made within each main group as in the German Draft Standard. Pelletteri's categories are:

0 Lineari	5 Contrastiformi
1 Rettiformi	6 Grafie o Scritti
2 Angoliformi	7 Fratti (gothic types)
3 Curviformi	8 Fregiformi (ornamented letters)
4 Degradanti	9 Ibridi e aberrazioni

A detailed adaptation of the Vox classification was made by John C. Tarr in 1955, which converts the system to a fully chronological table by means of extra categories and subdivisions. His method, although retaining Vox's terms, is essentially that of the many writers in German whose work was used for the preparation of the Draft German Standard published in 1959.

Many distinguished typographers have suggested classifications in Germany and Switzerland during the last eleven years. Paul Renner,[15] Jan Tschichold,[16] Hermann Zapf,[17] Albert Kapr,[18] Georg Schautz[19] and Georg Kurt Schauer[20] were the authors of suggestions which were taken into account when the preparation of a standard classification was attempted for use in German printing offices, typefoundries and printing schools. These schemes contained very detailed subdivisions of the gothic or 'broken' letter forms, on which a fair degree of agreement was reached. The proposals also agree in their general historical form, tracing the development of printing types from the early venetian roman until the full development of modern face. But the number of divisions to be made in the historical period, and the manner in which wholly new designs are to be treated, has not been a simple problem to solve. The essentials of the German Draft Standard are its use of a series of numbers which can be subdivided at will to produce new categories,

rather on the lines of the Decimal System used by libraries. Hermann Zapf's proposal that the radically different forms of old face cut in different countries should be distinguished has been adopted, but his original number of subdivisions has been increased. Many of the terms used for the groups are taken from outside the printing trade. *Renaissance* was suggested by Zapf, Schauer and Schautz, although Kapr proposed *Klassisch* (Classical). *Barock* (Baroque) is from Dr Schauer's proposal, a term more familiar in Germany than in this country when applied to subjects other than architecture, but which may be taken to cover an approximate period of 1650 to 1770. (The alternative proposals of 'Vorklassizistisch' or 'Übergangsantiqua' conveyed approximately the English sense of 'transitional'.)

The proposals which formed the basis of the German draft standard were discussed at a meeting in Hanover early in 1959 which included delegates from East Germany. The meeting, which agreed on the draft standard published in June 1959, fixed a period until 31 October 1959 for the filing of objections and emendations. The criticism which has been publicly expressed to date has been concerned with two main points. It is suggested that in providing the teacher with an adequate number of terms, the scheme has become too complex to be easily remembered and used by printers, and the scope of some of the main groups of roman types (especially twentieth-century examples) was felt to be too vaguely defined. It seems possible, therefore, that the German classification, although it is the only scheme in any country to have an official status at present, may well be open to further revision if it does not prove satisfactory in practical use. ✦

German Draft Standard DIN 16 518

1. ROMAN LETTER-FORMS

The subdivision of Roman known as 'Mediäval' (Medieval) has been deliberately abandoned, as its Latin meaning, 'of the middle ages', was misleading. The term Classic Roman would have been nearer, but as this could have been understood as a quality judgment, this term was not used and the 'Mediäval' types were added to the Renaissance group

1·1 RENAISSANCE

Variable stress, with minimum contrast in stroke thickness, bracketed serifs, oblique axis to stress of curves

1·11 Early form: e with oblique bar
1·12 Late form: e with horizontal bar
1·13 Modern form: types produced since 1890

1·2 BAROQUE

Variable stress, with greater contrast in thickness of strokes, serifs less bracketed, almost vertical axis to stress of curves

1·21 Dutch form
1·22 English form
1·23 French form
1·24 Modern form

1·3 NEO-CLASSIC

Horizontal initial strokes [serifs] to small letters, high contrast in thickness of strokes, right-angled junction of serifs, vertical axis to stress of curves

1·31 Early form
1·32 Late form
1·33 Newspaper form: Post - neo - classic roman with prominent serifs, designed primarily for Newspaper printing
1·34 Modern form

1·4 FREE ROMAN

Individual developments of historically derived forms

1·41 'Jugendstil' [the German *Art nouveau*] form
1·42 Serifless roman
1·43 Individual form

1·5 LINEAR

Sans-serif. Serifless types with strokes of optically equal thickness

1·51 Early form
1·52 Modern form

1·6 BLOCK ROMAN

Egyptian and 'Italienne' [French clarendon]. Types with slab-serifs

1·61 Early form

1·62 Late form [Clarendon]
1·63 Modern form
1·64 Typewriter-types
1·7 SCRIPT
'Roman' [as opposed to Gothic] cursive, formed by a writing instrument
1·71 broad-pen
1·72 flexible, pointed pen
1·73 strokes of equal thickness
1·74 brush script

2. FRAKTUR LETTER-FORMS
2·1 TEXTURA
2·2 ROTUNDA
2·3 SCHWABACHER
2·4 FRAKTUR
2·5 CURSIVE

3. EXOTICS
3·1 GREEK 3·2 CYRILLIC
3·3 HEBREW 3·4 ARABIC 3·5 OTHER

For all groups there are [can be] bold and condensed, italic, decorated and shaded forms

Thibaudeau's classification as tabulated in his book
'Manuel Français de Typographie Moderne'
published in 1924

Footnotes and Checklist of Authorities Quoted

1 Rudolf Hostettler, *Technical terms of the printing industry*, 3rd ed (St Gallen, 1959), pp 12–15, gives equivalents for the current conventional terms in English, French and German.

2 Deutsche Industrie Normen-Ausschuss, *Klassifikation der Druckschriften, DIN 16 518 (Entwurf)*. Published in German trade periodicals, for example: 'Klassifikation der Druckschriften nach Din 16 518 (Entwurf)', *Form und Technik* 7, 1959 pp 300, 301; 'Entwurf DIN 16 518 Klassifikation der Druckschriften', *Graphische Woche*, 20 June 1959 pp 498–500.

3 John Southward, *Modern printing*. 4 vols (London, 1898–1900). Vol I pp 134–150.

4 T. L. De Vinne, *A treatise on .... plain printing types* (New York 1900) pp 182–335.

5 H. L. Bullen, 'Notes towards the study of types', *The Graphic Arts*, Vol I No 1 (Jan 1911) pp 33–37; Vol I No 3 (Mar 1911) pp 201–208; Vol I No 5 (May 1911) pp 353–357; Vol II No 3 (Sept 1911) pp 173–183; Vol III No 5 (May 1912) pp 337–343.

6 F. Thibaudeau, *La lettre d'imprimerie* (Paris, c.1921). Vol II pp 416–471.

7 F. Thibaudeau, *Manuel français de typographie moderne* (Paris, 1924) 'Classification des caractères d'imprimerie', pp 37–109.

8 D. B. Updike, *Printing types, their history, forms, and use*, 2 vols (Cambridge, Mass, 1922. 2nd ed London, 1937).

9 Stanley Morison, *A tally of types* (Cambridge, privately printed, 1953), p 21.

10 Beatrice Warde, 'Type faces, old and new', *The Library*, 4th series, Vol XVI No 2 pp 121–143. Reprinted as a pamphlet (London, The Bibliographical Society, 1957).

11 Maximilien Vox, *Pour une nouvelle classification des caractères* (Paris, École Estienne, 1954). An English translation was published in *Printing World*, 30 July 1954. The revised classification of nine groups was published in *Printing World*, 8 August 1956 p 141. See also *Linotype Matrix* 28 (1957) p 4.

12 G. W. Ovink, *La classification Vox* [Duplicated] August 1955.

13 Aldo Novarese, *Il carattere: sintesi storica, classificazione, accostamento estetico* (Turin, 1957). Reprinted from *Graphicus*.

14 Giuseppe Pellitteri, 'Verso l'unificazione della tipologia', *Graphicus* 6, 1959 pp 9–12.

15 Paul Renner, *Die Kunst der Typographie* 3e Auflage (Berlin, 1953) pp 277–291 'Zur Ordnung und Benennung der Schriften'.

16 Jan Tschichold, 'Klassifizierung der von uns gebrauchten Buchdruckschriften', *Schweizer Reklame* (Sondernummer, May 1951).
———— , *Meisterbuch der Schrift* (Ravensburg, 1954), p 25 'Klassierung und Benennung der Hauptschriftarten'.

17 Hermann Zapf, 'Die Stilgruppen der Antiqua und ihre charakteristischen Elemente', *Gutenberg Jahrbuch* (Mainz, 1954) pp 9–14.
———— , 'Zur Klassifikation der Drucktypen', *Form und Technik* 2, 1949 pp 87, 88.
———— , 'Änderungsvorschläge zum NAGRA-Entwurf', *Form und Technik* 7, 1959 pp 302, 303.

18 Albert Kapr, *Deutsche Schriftkunst* (Dresden, 1955), pp 89–94 'Die schönsten Satzschriften der Gegenwart'.

19 Georg Schautz, 'Zur Ordnung unserer Druckschriften', E. Kollecker and W. Matuschke, *Der moderne Druck* (Hamburg, 1955) p 107.
———— , 'Klassifikation der Druckschriften', *Linotype-Post*, Neue Folge, Heft 38 (Feb 1958), p 9.

20 Georg Kurt Schauer, 'Versuche zur Ordnung des Druckschriftenbestandes in der jüngsten Gegenwart', *Börsenblatt für den deutschen Buchhandel*, 29 September 1959, pp 1274–1281. In this article, Dr Schauer surveys and criticises some of the more recent classifications.

Mr. DANIELSON [presiding]. The hour of 1:30 p.m. having arrived, the committee will resume its session.

This afternoon we are going to hear first of all from a few opposition witnesses to the provisions of title II; namely, Mr. Daniel Ebenstein, copyright attorney, Mr. Walter Dew for the International Typographic Composition Association and for Advertising Typographers Association of America, Inc., and, three, Mr. Alfred Wasserstrom, copyright attorney.

Will all of you gentlemen come forward. If it is not convenient, you need not.

Mr. WASSERSTROM. No; it is very convenient.

TESTIMONY OF DANIEL EBENSTEIN, COPYRIGHT ATTORNEY, ACCOMPANIED BY WALTER DEW FOR INTERNATIONAL TYPOGRAPHIC COMPOSITION ASSOCIATION AND FOR ADVERTISING TYPOGRAPHERS ASSOCIATION OF AMERICA, INC.; ALFRED WASSERSTROM, COPYRIGHT ATTORNEY; AND CHARLES MULLIKEN, INTERNATIONAL TYPOGRAPHIC COMPOSITION ASSOCIATION

Mr. DANIELSON. Fine, get yourselves shifted around and comfortable and maybe we will have other members.

For my own assistance, if you could give me the left to right lineup here, I would appreciate it. You, sir?

Mr. EBENSTEIN. My name is Daniel Ebenstein.

Mr. MULLIKEN. My name is Charles Mulliken. I am representing the International Typographic Association.

Mr. DANIELSON. You are with Mr. Dew?

Mr. MULLIKEN. With Mr. Dew.

Mr. DANIELSON. And Mr. Dew is No. 3.

Mr. WASSERSTROM. Mr. Dew is No. 2.

Mr. DANIELSON. But left to right. And I will bet you are Mr. Wasserstrom.

Mr. WASSERSTROM. Alfred Wasserstrom, right.

Mr. DANIELSON. Thank you very much, gentlemen.

Well, we will just proceed, then.

Mr. Ebenstein, if you will be so kind, will you lead off, and I doubt if you can read this in the allocated time, but give us the highlights.

Mr. EBENSTEIN. That is what I intend. Thank you.

My name is Daniel Ebenstein and I am a partner in the law firm of Amster & Rothstein in New York City. We represent Leonard Storch Enterprises. My client is one of the few independent manufacturers of type fonts in the country.

As you indicated, we will rely on our written statement and I will try in the next 5 minutes just to highlight two or three points I think are important.

First of all, our position. The copyright laws have never been interpreted to grant any exclusive rights in typeface design in the history of the law. The present bill, if adopted without amendment, would create no such exclusive rights. Title I adopts the prior law on this subject which created no rights as set forth in the Senate committee reports on S. 1361 which passed the Senate in the last term. Title II excludes typeface design by its very terms as Mr. Leeds testified this morning.

We oppose absolutely any amendment to bring typeface designs within the provisions of title I of the bill since the creation of rights

in such works is entirely inconsistent with the purposes and legal doctrines contained in title I.

We also oppose amendment to bring typeface designs within title II of the bill because without very extensive amendment, even the more limited rights created under title II will not prevent the very serious economic impact that exclusive control of typeface designs would have on the typographic and related industries.

I was going to say something about what typeface design is, but I think that was covered in questions very well this morning. The only thing I would add to what was said this morning is that as was said, typeface designs are the shape of letters used to communicate through language. We are not talking about ornate decorative lettering. The creation of these letterforms is the craft of making letters easily readable, compatible with current printing techniques, high-speed printing and the like, unitized for typesetting, and meeting all the other technical requirements of such alphabets.

These letter shapes and all their minor variations have always been and must remain in the public domain.

More important is the commercial situation in which we find ourselves on this issue. Interestingly, the advocates of this expansion of the copyright law are the few large manufacturers. The history of copyright expansion, I think, has been the opposite. Those who have traditionally favored expansion of the copyright law have opposed this change. The Author's League, Mr. Latman, others who testified before the Copyright Office at hearings that were held this past November.

The heart of the commercial problem as we see it is that a natural tie-in exists between type font and typesetting equipment. Essentially, every type manufacturer manufactures fonts which will fit and work only in his own typesetting machines and, conversely, a type font manufactured for the Mergenthaler machine is useless on any other piece of equipment. If in addition to this natural tie-in, the manufacturers obtain exclusive rights in the typefaces, then for a typographer or a printer to do work in that typeface, he will require that manufacturer's equipment. The company then that controls the few popular typefaces of the day will control the typesetting industry and the typesetting manufacturing market.

There was some comment this morning about ITC and there was counsel here from ITC.

Mr. DANIELSON. What is ITC? I am sure it is obvious to you, but I never heard of it.

Mr. EBENSTEIN. International Typeface Corp., sir.

Mr. DANIELSON. Thank you. I have heard of ITT, but it is not the same.

Mr. EBENSTEIN. No; there was talk about 33 voluntary licensees of ITC. Well, my clients testify to the results of not volunteering as a licensee. What ITC and the other type promoters have done is dredge up old typefaces from the past, sometimes with minor modifications, sometimes with no modifications, repromoted them to the user, the advertiser, the printer, thereby creating a demand for these faces, and has forced the typesetting industry into taking licenses to use these alleged new treatments of old typefaces.

Contrary to things that were said this morning, those licenses have run to 70 and 100 percent of the cost of the fonts. My client was offered

the opportunity to join ITC. He declined on the advice of antitrust counsel and I would like to submit to the committee something that was not attached to my statement and that is an opinion of Weil, Gotshal and Manges of New York on the antitrust implications of ITC and what the manufacturers are attempting to do and the basis for my client's not joining ITC.

Mr. DANIELSON. If there is no objection, we will attach the document which the gentleman has proffered to his statement for the record, though very frankly I didn't think there was anything left to attach. [Laughter.]

[The material referred to follows Mr. Ebenstein's statement.]

Mr. EBENSTEIN. Well, Mr. Danielson, this is very complicated. It is an opportunity to make a point. This is a complicated issue. The proponents of this legislation have tried to present it, very simply, as a matter of "typeface piracy." This is a very, very difficult issue and I hope if the committee is going to seriously consider the proposals that were made that the committee will look into the industry and the industry structure and understand what the problems are.

Just one more point that I would like to make and that is that in view of our involvement with ITC, we did go to the Department of Justice. We were advised within recent months that the Department of Justice has authorized an investigation of ITC and the manufacturers groups that have been fostering this and——

Mr. DANIELSON. On what—for what reason? For what purpose?

Mr. EBENSTEIN. Well, I think the outline contained in——

Mr. DANIELSON. It had nothing to do with the White Slave Traffic Act. What is the purpose of the investigation?

Mr. EBENSTEIN. The purpose of the investigation is to determine whether the manufacturers have conspired together.

Mr. DANIELSON. Antitrust.

Mr. EBENSTEIN. In order to——

Mr. DANIELSON. Antitrust.

Mr. EBENSTEIN. Antitrust, yes. I'm sorry.

Mr. DANIELSON. What was the purpose?

Mr. EBENSTEIN. I'm sorry. I thought I said that.

Mr. DANIELSON. Thank you, Mr. Chairman. I did give Mr. Ebenstein 3 more minutes here. I am not going to hold that against you, sir.

[The prepared statement of Daniel Ebenstein follows:]

STATEMENT OF DANIEL EBENSTEIN, ON BEHALF OF LEONARD STORCH ENTERPRISES, INC.

SUMMARY OF POSITION

The Bill before the Committee (H.R. 2223), as drafted, does not provide any exclusive rights for typeface designs either under Title I or Title II. We oppose absolutely any amendment to bring typeface designs within the provisions of Title I of the Bill since the creation of rights in such works are entirely inconsistent with the purposes and legal doctrines inherent in Title I. We oppose amendment to bring typeface design within Title II because, without very extensive amendment including mandatory licensing at reasonable rates, even the more limited rights created under Title II will not prevent the very serious economic impact exclusive control of typeface designs will have on the typographic and related industries.

We feel that any legislative action for the protection of typeface design should be directed to amendment of the standards applicable to typeface designs under the Design Patent Laws where typeface designs are now protected.

DEFINITION OF TYPEFACE DESIGN

It is difficult to appreciate the consequences of the creation of exclusive rights in typeface designs without an understanding of what "typeface design" is. Perhaps the simplest way to define "typeface design" is to distinguish it from other terms with which it is frequently confused, such as "typography" and "ornamental lettering" and to provide a few examples of each.

We use the term "typeface design" to refer to the shape or form of letters of the alphabet which are used essentially to communicate information through language. Such letters are also referred to in the trade as "text alphabets" and are the letter forms in which text is printed in books, magazines, etc. Attached hereto as Exhibit A are examples of ten different typeface designs of the kind for which the proponents of amended legislation seek protection. The attached exhibits are style sheets produced by Alphatype Corporation of Skokie, Illinois for the typefaces Baskerline, Bodoni, Caledo, Century Text, Claro, English, Futura, Garamond, Patina and Versatile. These were selected at random from the Alphatype type book, a copy of which will be provided to the Committee at the Hearings.

The phrase "typography" is easily distinguished from typeface design and is essentially the arrangement, style or layout of printed matter on a printed page or other work, including the spacing and positioning of letters and words.

The distinction between typeface design and "ornamental lettering" is somewhat more difficult. At the extreme, ornamental lettering encompasses the type of letter ornamentation including figures, flowers and other traditional pictorial elements used at paragraph beginning in Bibles or other ancient works. Samples of such lettering are attached hereto as Exhibit B. These are taken from the American Typefounders Company type book of 1923, which will also be made available to the Committee at the Hearings.

An additional category of ornamental lettering is lettering wherein the letter forms themselves are modified to represent or incorporate pictorial elements or where other extreme theme oriented modifications from conventional letter forms are used. A large dracula with blood dripping from every letter, or letters incorporating stars and stripes are typical of this type of lettering and representative samples of lettering of this type is shown in Exhibit C. Letter forms of this type are used in advertising, principally to call attention to themselves or to communicate pictorially. This does not mean, of course, that ordinary text-type faces, in large sizes, may not also be used for display or headlines. However, display lettering of the type we have included in "ornamental lettering" would not be useful for normal text reading.

We take no position on whether typography or ornamental lettering is or should be protected under the Bill. We are concerned here only with "typeface" design.

NEITHER TITLE I OR TITLE II OF THE BILL (H.R. 2223) AS PRESENTLY DRAFTED WOULD CREATE ANY EXCLUSIVE RIGHTS IN TYPEFACE DESIGNS

Title I

Typeface design is not recognized as copyrightable subject matter under the present Copyright Law and Regulations and Title I of the Bill (as well as S. 1361 which passed the Senate in the 93rd Congress and S. 22 presently before the Senate) adopts the present law on this issue.

The designing of a typeface is essentially the craft of creating letter shapes to be legible and useful in the communication of information through language and has never been recognized as copyrightable subject matter under the Copyright Act of 1909. This has been the continuous conclusion of the Registers of Copyright from 1910 to the present, with the possible exception of the current Register who, as indicated by her letter to the Committee, still has the matter under consideration. Typeface design is specifically excluded from the present Copyright Law by Section 202.1(a) of the Copyright Office Regulations promulgated in 1956. At hearings held before the Copyright Office on November 7, 1974, to review these Regulations, the authorities in the field (including Mr. Allen Latman, Mr. Irwin Karp and others who have traditionally favored broad interpretation of the Copyright Act), expressed the opinion that typeface design was not protected under the present law. A copy of the transcript of these hearings will be made available to the Committee. Further, the recognized authors in the field (including Nimmer in his work on Copyright) agree that ordinary typography, which in our terms would include typeface design, is not copyrightable under the present Act.

A very thorough, complete and scholarly analysis of the status of typeface design under the present law, including an analysis of all the relevant cases and of the opinions of the various Registers of Copyright was prepared by Harriet L. Oler of the Copyright Office legal staff during the period July, 1971 to September, 1972. A copy of this 80-page study is attached hereto as Exhibit D. This study is not presented as the position of the present Register of Copyrights, but merely as the most recent and one of the most scholarly analyses of this subject to date. As stated in this study:

"Aside from the ornate type character, which has long been registrable if it contains sufficient original authorship a work of art, each new letter typically bears a strong resemblance to extant characters. Hence, even apart from characters' utilitarian aspects, they probably do not contain sufficient authorship to be registered as works of art. But individual characters are arguably utilitarian objects in that they are devices by which information is communicated As such, a character would be registrable under Office standards as a work of art only if it contained more than a minimum amount of original and separable artistic authorship, and if its shape were not dictated primarily by its function. This category does not embrace the 'ordinary' new commercial type characters whose copyrightability is the focus of this paper."

In the history of U.S. Copyright Law no typeface design has ever been permitted copyright registration and copyright in a typeface design has never been enforced by any Court. Clearly, the present Copyright Law creates no exclusive rights in typeface designs.

Title I of the Bill, as drafted, adopts the present law on this issue. Section 102 of the Bill states that Title I relates to "works of authorship" in place of the provisions of the present law which relates to "all the writings of an author." The report of the Senate Committee on the Judiciary on S. 1361 (Report 93–983) at page 103 indicates that the intention of this charge is to make it clear that the constitutional and statutory provisions are not co-extensive (which had previously been decided in spite of the fact that identical language was used) and that S 1361 (and the Bill) do not exhaust Congress's constitutional authority.

The report also states that the history of expansion of the types of works accorded protection under the Copyright Law has fallen into two general categories. The first includes new, expressive forms (such as electronic music, computer program, etc.) which never existed before, but which could be considered extensions of copyrightable subject matter Congress had already intended to protect. These have from time-to-time been considered copyrightable without the need of new legislation.

The second includes works of known kind, but not specifically covered (such as photographs, sound recordings, motion pictures, etc.) and as to these works the report states that statutory enactment was deemed necessary. The report indicates that the present Bill intends to continue this same pattern of growth and states "Although the coverage of the present Statute is very broad, and would be broadened further by the added recognition of choreography and sound recordings, there are unquestionably other areas of existing subject matter that this Bill does not propose to protect, but that future Congresses may want to."

Typeface design is certainly not a new expressive form but has been in existence from the introduction of movable type and before. Many typefaces in common use today trace their origins to the turn of the century and prior. During hearings before the Copyright Office on November 7, 1974, and during the Symposium on Typeface Design conducted by the Department of Agriculture, there was considerable testimony that while the tools of the designer have changed from metal type to film type to cathode ray tube type, etc., the work product of the designer has remained substantially the same, changing only technically to take advantage of new methods. Thus, typeface design within the second class of works which the report states would require specific legislation and enactment.

Further, the present Bill and S. 1361 (as well as S. 22) are identical in that they replace the present titles of the copyrightable subject matter Classes (f) through (k) with the phrase "pictorial, graphic and sculptural works." The Senate report clearly states that "the term is intended to comprise everything now covered by Classes (f) through (k) of Section 5 in the present statute . . ." and no broadening of prior coverage is intended.

The report also specifically indicates the intent of the Senate Committee and the drafters that the present Bill perpetuates the standards set forth by the Supreme Court decision in *Mazer* v. Stein, 347 U.S. 201 (1954) on which the

Oler study, the present regulations and current scholarly opinion have been based.

Thus, Title I which is identical to the Senate version S. 1361 (now S. 22 in the 94th Congress) does not purport to extend copyrights to typeface designs. As set forth in more detail below, amendment of Title I to specifically incorporate typeface designs would be disastrous.

Title II

Title II of H.R. 2223, as presently drafted, does not cover typeface design because of the definition of "useful articles" contained in Section 201(b)(1) and because of the exclusions of Section 202(b), (c) and (d).

Title II of the Bill provides protection for ornamental designs of "useful articles". Possibly without specific intention, the term "useful articles" is defined in Section 201(b)(1) (and in Section 101 of Title I) of the Bill in such a way as to specifically exclude ornamental designs of the letters of the alphabet. A useful article is defined in Section 202(b)(1) as "an article which in normal use has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." The letters of the alphabet certainly have a "utilitarian function" and should be considered in the same light as other useful articles in this regard, as discussed in detail in the Oler study and by numerous commentators during the November 7, 1974 hearings before the Copyright Office. However, the intrinsic utilitarian function of the letters of the alphabet is merely "to convey information" and thus is specifically excluded from the definition of useful articles in this paragraph.

It may be argued that the type film font or film strip is the "useful article" whose function is to make printing plates. However, viewed this way, the shape of the type on the font is certainly not an ornamental design of the font such typeface is not intended to ornament the font or affect the font's appearance but only to be projected by mechanical means as letters of the alphabet. If a film font is a useful article and the shape of letters of the alphabet on it is the "design" of the font, then a reel of movie film is similarly a useful article and the pictures on the film are its "design" and motion pictures would be protected under Title II. Under this interpretation, photographic slides (transparencies) would be protected while photographs would not. Similarly, books could be deemed useful articles with the printed text being the "design" of the book. Certainly, Title II is not intended to be interpreted in this way and the ornamental design must ornament or be intended to affect the appearance of the useful article as opposed to being an integral element of its utility.

Thus, while Title II, which is designed to cover useful articles would be the more appropriate place to consider typeface design under the Bill (if at all), the initial definitions of Title II appear to specifically exclude typeface design from this Title.

Secondly, the exclusions contained in paragraph 202(b), and (c) deny protection under Title II to articles which are "staple or commonplace, such as a standard geometric figure, familiar symbol, emblem or motif, or other shape, pattern or configuration which has become common, prevalent or ordinary" and excludes protection of all designs which differ from such staples "only in insignificant details or elements which are variants commonly used in the relevant trade." Section 202(d) further denies protection to configurations which are "dictated solely by utilitarian function of the article that embodies it." Under these standards, substantially no typeface design would be subject to exclusive rights.

Certainly, typeface designs as defined above and as shown in Exhibit A (which are fairly representative of the degree of variation to be expected in text typefaces) are familiar symbols which have "become common, prevalent or ordinary." And, under 202(c), the designs shown by Exhibit A differ from one another only in "insignificant details" or in elements which are "variants commonly used in the trade." Volumes have been written on modification of typeface designs by addition of serifs (the feet at the base of the letters), alterations in boldness of vertical stroke, horizontal stroke, etc. and these variants are very commonly used. In fact, many such variants can now be mechanically introduced either by lens systems or computer dictated programs.

If anything is "staple or commonplace" or a "configuration which has become common, prevalent or ordinary," it is the shape of the letters of text alphabets.

Under Section 202(d), typeface design would be excluded since the shape of the letters are dictated by the utilitarian function of the alphabet, i.e., legibility and use in printing. Numerous witnesses at the Copyright Office hearings (Mr.

Solo for one) and the designers who appeared at the Typeface Symposium conducted by the Department of Agriculture on October 15 and 16, 1974, conceded that the functions of the typeface designer is to create an alphabet that is legible and readable. As Adrian Frutiger said at the Symposium, the "beauty" of a typeface "is its readability" and as Klaus Schmidt said, the typeface design should be "invisible" putting words in the reader's mind without interference from style.

There are those who have argued that the basic form of a letter is a simple stick figure of the letter and that anything added to the stick figure is "design" and not "utility." This is entirely untrue and there are volumes written on the use of various conventional typeface variants (such as serifs, distinctions between capital and lower case letters, certain width and thinness relationships, use of white space within the letter and other features) to create identification and recognition of the letter form in text reading. These elements of shape, which have been executed and reexecuted over hundreds of years, are not elements of design, but are elements of utility in that they serve to make the alphabet legible and useful.

Numerous studies have been done and volumes written about the design of letter shapes for readability. Three volumes which discuss and review some of the work done in this area are Miles A. Tinker, *The Legibility of Print*, Iowa State University Press, 1963; George R. Klare, *The Measurement of Readability*, Iowa State University Press, 1963; and Sir Cyril Burt, *A Psychological Study of Typography*, Cambridge University Press, 1959.

In summarizing the legibility of letters and digits in *Legibility of Print*, Professor Tinker states (p. 42) that the legibility of a typeface is determined by "judicious use of the following: (a) Serifs, (b) heaviness of stroke, (c) delineation of distinguishing characteristics, (d) simplification of outline, (e) white space within a letter, and (f) width of the letter."

In short, if your daily newspaper were printed in stick figure capital letters, it would be impossible to read with any speed. Typeface design makes the alphabet usable.

In addition to the elements of letter form which are utilitarian in that they are directed to the readability of the alphabet, there are many features of letter shape which are dictated by the technology of printing and typesetting, or the mechanics of the eye. These elements of form are also clearly dictated solely by utilitarian function of the article. For example:

(1) Modern high speed printing and modern ink types have required adjustments in letter shape to permit appropriate ink flow when printed at high speeds. Thus, in modern alphabets the old fine vertical lines which would become washed out in high speed printing had to be filled out and broadened, substantially changing the appearance of the typeface. Also, white spaces used in letter forms had to be broadened so that the use of high flow rate inks in high speed printing equipment would not bridge the white areas of the letters.

(2) Alphabets have to be carefully "unitized," i.e., letters must be designed to fit into specific discrete width measures so that they can be "justified" in modern typesetting equipment. In equipment of this type, every character must have a discrete number of units of width, the single width unit being a fixed quantity for that machine. Accordingly, portions between letter widths (which may significantly affect the appearance of the letters) must be selected for functional reasons.

(3) Modern alphabets must be reproducible on cathode ray tubes so as to be functional in systems where typesetting is accomplished by photographing a cathode ray tube. This is clearly the high speed print production method of the future. However, the cathode ray tube accuracy depends upon the number of dots per square unit of area available on the tube and commercial systems tend to sacrifice resolution for higher speed which can be obtained with fewer dots per area. The alphabet letters are inherently distorted by display on a cathode ray tube because it is impossible to draw a smooth curve with dots arranged in horizontal lines. The shape of the letters used on systems of this type must be created so that the built in errors of the cathode ray tube are deemphasized rather than emphasized by the letter forms. This is, again, a functional feature of shape.

(4) Further, it is a well known physical phenomenon that the letter shape must be designed to overcome several basic optical illusions resulting from the mechanism of the human eye itself. The eye tends to see vertical strokes as being broader than horizontal strokes of equal width. In order to create uniform appearance of line width, the width of the various elements of the letter must thus be varied. Further, the eye tends to see lines that meet at angles (such as the base

of the letter "v" or "w") as being of varying thickness when in fact they are of uniform thickness. These optical illusions are traditionally corrected in designing an alphabet and this is not an element of ornamentation.

In summary, the shape of a text alphabet is dictated by its function and any minor elements of shape intended for ornamentation would be impossible to detect and distinguish. Thus, under the definitions and under the substantive provisions of Title II as now drafted, no exclusive rights in typeface design would be created.

WE OPPOSE AMENDMENT OF THE BILL TO CREATE EXCLUSIVE RIGHTS IN TYPEFACE DESIGNS

The issue now before the Committee has frequently been characterized by the proponents of change as "typeface piracy" in an attempt to analogize the present situation to the tape piracy issue.

In fact, the issue here is not a matter of "piracy" at all, as should be evident from the array of groups who have opposed the proposed creation of exclusive rights in typefaces. For the first time, it is not the individual artist or creator who is pressing for expansion of the Copyright Law, but the large commercial manufacturers and promoters (specifically, Mergenthaler Company and International Typeface Corporation). Those who have opposed the creation of exclusive rights in typeface design, for example, those who testified in opposition at hearings before the Copyright Office, include Irwin Karp of the Author's League of America, Allan Latman who testified here concerning Title II, the national associations of typographers who would bear the brunt of the proponents economic power if exclusive rights were created, the publishers as represented by the Hearst chain and many others. Further, the American Institute of Graphic Arts (AIGA) which represents the typeface designers and graphic artists themselves, issued a position paper on typeface supporting some form of compensation for the artist (which we would fully support), but opposing creation of exclusive rights in typefaces, i.e., insisting on some program of mandatory licensing making all typefaces available to all manufacturers and some screening procedure limiting protection to typefaces approved by a panel of experts. A copy of the AIGA position paper is attached hereto as Exhibit E.

In short, the pressure being brought to bear for creation of exclusive rights in typeface designs is an effort by the industry giants (who themselves started in business by copying every typeface design then available) to shut the door to new competitors by obtaining exclusive rights in the single most important part of typesetting equipment, the typeface, and to perpetuate their market position by tying equipment sales to exclusive typefaces which they have the power and position to promote and popularize. If granted exclusive rights in typeface designs to the exclusion of competitors, the large manufacturers would have the power to force typographers to buy their equipment in order to set type in their exclusive typefaces which would be demanded by the typographers' customers. The liberal provisions of copyright were never intended to be abused in this manner; the exclusive rights which the proponents seek are entirely incongruous with the concept of the Copyright Laws as embodied in the present Bill; and the creation of such rights in the Bill before the Committee would seriously damage the typographic industry as it exists today.

INDUSTRY BACKGROUND

To appreciate the pivotal role of typeface design in the typographic industry, one must know something about the structure of the industry.

The independent typographers of this country comprise approximately 1600 small business units (¾ with under 20 employees) scattered throughout the country according to a 1971 report of the U.S. Department of Commerce. The 1600 typographers operate on a very low profit margin, usually under five percent of sales before taxes. It is a highly competitive business with most cities having a number of competing firms who vie for business on the basis of quality, price, service, etc. As I am sure the spokesman for the ATA and ITCA (the national typographers groups) will affirm, the typography industry is probably one of the most competitive industries in the United States today.

There are approximately six popular machines (manufactured by six large companies) on the market (other than computerized systems), for phototypesetting text type, i.e., the text portion of advertising or other printing. Each of these machines represents substantial investment for the typographer and costs

range in the area of $10,000.00 and $30,000.00 for a single series of conventional equipment to hundreds of thousands of dollars for computerized equipment. A conventional text phototypesetting line would include a keyboard (very much like an IBM typewriter keyboard with added controls) and an assembling unit. Information introduced at the keyboard is converted to paper tape, electronic tape or other form which is then placed on the assembling unit. The type font is inserted in the assembling unit which moves the font in conjunction with a group of lenses and shutters to expose the appropriate letters on a sheet of film from which the printing plate can eventually be produced.

In addition to the text machines referred to above, less expensive semi-manual machines are employed in the setting of display type for headlines, etc. in an essentially manual letter-by-letter operation.

Each typographer will generally have only one manufacturer's phototypesetting equipment, even though he may have more than one unit. The reason is obvious. With all the same equipment, the same machine operator can work on one machine or another: a single repair facility can service all equipment in the shop; spare or replace parts for only one type machine need be available; etc.

More important, in addition to the investment in machinery, the typographer's most substantial additional investment is his investment in type fonts, the film sheet which contains letters of the alphabet, etc. in one particular typeface. For a representative machine such as the Alphatype machine, there are approximately 250 different typefaces available (two faces per font) with approximately 10 individual fonts being required for each typeface in different point sizes. Each such font sells for about $65.00 per font. If an average type shop has only 160 different typeface designs in all point sizes, it would require approximately 800 different fonts which represent an investment of approximately $52,000.00 over and above the cost of the phototypesetting equipment. These text fonts are not interchangeable between the machines of different manufacturers and a font manufactured for the Alphatype machine is useless on a Mergenthaler or Singer machine just as a font for a Mergenthaler machine is useless on Alphatype or Singer machines. Thus, one of the most important economies in using only one manufacturer's equipment is that the typographer need stock only a single library of fonts.

As should be apparent from the above facts, each machine manufacturer has a ready-made captive market for the sale of fonts for its particular machines and fonts are sold at a substantial profit. A font for the Alphatype machine which costs approximately $65.00 represents approximately $8.00 of parts and labor, including designer's fees or designer's salary, if any. It is not surprising that according to its 1973 Annual Report, Alphatype Corporation, which did a gross business in 1973 of 4.85 million dollars, reported pre-tax profits of 2.8 million dollars, and in 1974 on sales of 4.94 million dollars reported profits of 2.6 million dollars. That's in excess of a 55 percent profit margin (almost unheard of in American business) as compared to the typographer's 5 percent margin.

Other manufacturers' fonts are even more expensive, for example, $131.00 for a Mergenthaler font.

The incentive for manufacturers to introduce new typefaces is obvious and the history of typeface innovation has shown that manufacturers respond to the economic return available to the company that introduces and popularizes new typeface designs. Manufacturers have over the years spent considerable time promoting new typeface designs to the advertising agencies and other users of type in order to generate sales for their very profitable new fonts. Some manufacturers have departments whose entire purpose is devoted to the promotion of new typefaces and it is well known in the industry that even the best new typeface design would not be worth a penny without promotion.

EFFECT OF EXCLUSIVE OWNERSHIP OF TYPEFACE DESIGN ON TYPOGRAPHIC INDUSTRY

Under the law as it has existed to date wherein there are no exclusive rights in typeface designs, new modifications quickly become available on a variety of machines and important faces can be made available on every machine. Interestingly, when Leonard Storch Enterprises introduced its first entirely new typeface (OLIVETTE) in fonts for the Alphatype machine and began advertising and promoting the new face, Alphatype Corporation quickly copied the face (under the name OLIVANTE). Copying typefaces is a necessary part of the typography business.

The reasons the manufacturers would like to alter the present law and obtain exclusive rights on new typeface designs are (1) to protect their exorbitant

profit position in the sale of fonts by excluding all independent manufacturers and hence all competition; and (2) with proper promotion, a strong manufacturer could create a demand for a new face which it alone would have the exclusive right to sell. The powerful manufacturers (Mergenthaler and others) would then make these exclusive faces available on their machines and nowhere else. Since fonts are not interchangeable from machine to machine, this is easily done. These exclusive typefaces would be used to generate new machine sales which would in turn be used to generate sales for other fonts.

For example, an advertising agency or other customer for typography is exposed to the manufacturer's new typeface promotion and decides to have a particular job set in that typeface. He sends the job to his typographer. If the typographer has the manufacturer's equipment, no problem is created. But, if the typographer has the equipment of a different manufacturer, the face would not be available. He must then either refuse the job (and eventually lose the customer), or buy the other manufacturer's equipment. Having bought the other manufacturer's equipment, it would be extremely inefficient for that equipment to sit idle except when the particular exclusive typeface is needed. Therefore, the typographer would have to buy at least a partial library of typefaces for his new equipment. The result will be that for a typographer to effectively compete, he must have available equipment of all the major manufacturers. Most typographers in business today could not operate their business under those circumstances.

It should also be made clear that under the present industry structure, the creation of some new exclusive right in typeface design would not improve the position of the individual typeface designer. The typeface designer (there are perhaps 20 such designers in the world) cannot popularize and sell a new typeface without the sponsorship and promotion of one of the major manufacturers or typeface promoters, and there is nothing in the present Bill to require the manufacturer or promoter to license others. Nor is there any reason to believe that the designer will share in any way in the manufacturer's resulting sale of machines and other fonts.

There is more than enough profit in the sale of typefaces under the present law to compensate the designer very well, if that was the manufacturer's desire. Our client would have no objection to a plan to compensate the typeface designer for original work and, in fact, does so in connection with his original faces. In fact, he has offered design fees to several designers, but was told that they could not be accepted because of obligations to large manufacturers and promoters. In short, the large companies arguing for exclusive rights are simply using the designer and the Copyright Law in an attempt to get the commercial result they desire.

The manufacturers and promoters who seek the creation of exclusive rights argue that they have no intention of maintaining exclusive control over typeface designs and of forcing sales of typesetting equipment through such exclusivity. But Congress cannot grant new rights based on a back door assurance that such rights will not be used. The manufacturers' move toward exclusive typefaces has already begun. Apparently expecting a change in the Copyright Law (by Copyright Office action) in April, 1974, Mergenthaler, in March, 1974, began promoting its new exclusive typeface, AURIGA. Attached hereto as Exhibit F is a full-page ad taken from a trade journal for the Mergenthaler AURIGA typeface published in March, 1974, bearing the notation "Typeface Copyrighted 1974 Eltra Corporation" (Eltra is the parent company of Mergenthaler).

If granted exclusive rights in typeface design, the large manufacturers will use those rights to monopolize the typographic machinery business.

International Typeface Corp.

More dangerous even than the large manufacturers operating independently is the new organization or cartel of manufacturers operating under the name International Typeface Corporation (ITC). ITC was originally created on a 50/50 basis by an advertising agency and a typographer and has actively promoted change in the Copyright Laws since its inception. In fact, it has frequently advertised that one of the principal uses for its funds is to obtain exclusive rights for typeface designs. When our client was asked to join ITC (after having been refused membership a year before), he was advised that a $5,000.00 "contribution" to the fund to change Copyright Law would be expected.

The activities of ITC over the past four years suggest the kind of commercial power that will be created by exclusive rights for typefaces. Even without exclusive rights, ITC purports to license the right to reproduce new ITC typefaces

or ITC's "new treatments" of public domain faces. "New treatments" is simply a euphemism for an old face which has been reintroduced and repromoted by ITC. ITC's brochures and advertising materials are slick and their channel of communication to the advertising agency is direct. They are selling and collecting royalties on typeface designs that are old and well known and the public domain origin of many of the typefaces promoted as "new" ITC faces can be found in old works such as the ATF 1923 type catalog. Attached hereto as Exhibit G is a sample page from ITC's promotional literature on the Souvenir face as carried by ATF in 1923. These typefaces are essentially identical.

For the right to use this "new" typeface treatment in fonts for its machines, the manufacturer has had to pay a royalty of approximately 100 percent of the price of the font. For example, the royalty paid to ITC on an Alphatype font (list price $65) was $40.00. The manufacturer is instructed that this royalty should be passed on directly to the manufacturer's customer, the typographer. This in fact is done and an Alphatype font (which normally sells for $65), sells for $100.00 wherein it relates to an ITC "new treatment". Similarly, a Mergenthaler font for an ITC face on which Mergenthaler paid a royalty of approximately $200.00 per font, sold for $331.00 rather than the usual $131.00. The manufacturer, therefore, has nothing to lose by "taking a license" in that the entire royalty obligation is passed on directly to his customer, the typographer. The typographer is in no position to refuse to purchase the new face because his customer, the advertising agency, to whom ITC has promoted its "new" treatment, demands the new face.

To date, in the absence of copyright, ITC has obtained its royalties by threats and coercion; by giving favorable treatment to certain manufacturers while denying admission into ITC to others; by decrying "piracy" to the type customer and requiring agreements of its members and typographers to boycott fonts not manufactured under the sponsorship of ITC (even those bearing the old Souvenir face). If new exclusive rights were created, without appropriate safeguards, ITC's power would control the industry. If ITC had the power to deny its new face to any particular manufacturer or any particular typographer, it would have the power of life or death over that typographer or manufacturer.

Even more significant, if exclusive rights become available, ITC and the present manufacturers will be in a position to prevent new firms (including our client) from entering the phototypesetting machinery business. Interestingly, the very first thing Alphatype, and all the other manufacturers did on going into business was to provide on their machines all popular typefaces then on the market which their customers needed. Without these typefaces, the typographer would have no use for a new manufacturer's equipment. If, after some period, the popular faces are owned exclusively by the large manufacturers or groups of manufacturers, no new firms will be able to enter the phototypesetting field.

To summarize, the right to exclusively control new typeface designs is the power to control the typesetting industry. This is what the advocates of copyright are after and this is what they will have if such rights are created.

Because of the practices of ITC and its manufacturer members and the power they have exercised to exclude competition; and faced with the choice of joining ITC or being branded as a "pirate", our client sought an opinion on the legality of ITC's activities from Anti-Trust counsel. A copy of the opinion of Weil, Gotshal & Manges, Esqs., on ITC's practices will be submitted to the Committee at the hearings. The opinion concludes that ITC's activities "raise most serious anti-trust problems both for ITC and its members" and that there would be a substantial anti-trust risk involved in joining ITC. As a result of this opinion and the inherent unfairness of the ITC scheme to the typographer, my client has gone the other route and been branded a "pirate".

The practices of ITC and the manufacturer have been called to the attention of the Department of Justice and the Department has authorized an investigation into ITC's activities. We hope this investigation will proceed rapidly to expose and put an end to ITC's methods and prevent ITC from dominating the typographic industry in this country.

BASIS FOR OUR OPPOSITION TO EXTENSION OF THE PRESENT BILL TO EMBRACE TYPEFACE DESIGN

Because of the economics of the typographic industry, and the natural tie-in between typeface designs and typesetting machines, there is no public interest to be served by creating exclusive rights in typeface designs. Those who introduce new typeface designs under the present system obtain more than adequate

return to create incentive for innovation and to provide a good return on their investment. At the same time, creation of such rights would have adverse economic consequences for the typographic industry far beyond the issue of typeface protection.

As to the present Bill, there are several additional reasons to oppose the creation of exclusive rights in typeface design under the term of this legislation. as follows:

1. Any creation of exclusive rights in typeface design must be accompanied by mandatory licensing at reasonable rates to prevent the manufacturers from tying typeface designs to the sale of equipment, i.e., requiring that one buy their typesetting machine to use a particular typeface or completely preventing competitive manufacture of fonts for their machines. The designers themselves in the AIGA position paper insist on mandatory licensing and apparently even the proponents of change concede that mandatory licensing would be required. Inclusion of type face design in the present Bill will not provide mandatory licensing.

2. Amendment of the present Bill to bring typeface design within the scope of Title I would be entirely unworkable and unreasonable. The traditional concepts of copyright as embodied in decisions under the present law create standards for the creation of copyright which are totally inapplicable to utilitarian items such as typeface design. Decisions under the present law have granted copyright to more "distinguishable variations" of public domain works. While this standard may be appropriate in works of art, it is entirely inappropriate where utilitarian articles such as the alphabet are involved. This is clearly recognized in Title II where Section 202 precludes design protection of utilitarian articles which are merely traditional or commonplace variations of public material. If typeface design is considered under any section of the Bill, it cannot be Title I.

3. The present Bill provides substantial procedural advantages for the copyright or design proprietor on the assumption that he will be the small and weak party in any enforcement procedure. Just the opposite is true in the case of typeface design. For example, under the Bill, even if a claim to copyright were rejected by the Copyright Office and registration refused, the owner could still bring an action against an alleged infringer under section 411(a) which permits a Court to determine registrability in an infringement action. A similar provision is contained in Section 220(b) of Title II. Coupled with the manufacturers' disproportionate economic power, this provision would give the manufacturer virtual control of the market since no one could finance the legal battles required to survive.

4. As presently prepared, the Bill provides no meaningful prescreening of works alleged to be subject to protection (as opposed to the design patent laws where typeface designs are now protected and wherein a thorough search is made by the Patent Office). As indicated in testimony during the hearings before the Copyright Office, there are presently approximately 20,000 typefaces which are in the public domain and under the Bill the Copyright Office cannot conduct any search or investigation in connection with an application for registration. The designers themselves (as represented by the AIGA) suggest that a group of experts be formed to determine what typefaces, if any, could be deemed new and entitled to protection. Obviously, neither the Copyright Office nor the Administrator of Designs under the present Bill is in a position to make use of such expert advice and investigation.

The great danger in our view is that, because of the relatively small size of the industry involved, the Committee will not see fit to tackle this problem in the detail that it requires. If such is the case, the Committee must leave the Bill in its present form (which does not provide exclusive rights to the typeface designs) and consider the typeface question at a later date, perhaps under the Design Patent Statute. Arbitrary inclusion of typeface design in the present Bill would be a reckless and damaging step.

ALPHATYPE FONT COMBINATION

Baskerline/*Baskerline Italic*

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9 Baskerline
MODERN COMPOSITION DEPENDS ON THE REFRESH 8.5
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10 Baskerline
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0123456789$ *3.00*

11 Baskerline
MODERN COMPOSITION DEPENDS ON TH 10.5
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0123456789$ *2.71*

12 Baskerline
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0123456789$ *2.58*

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Printer Benjamin Franklin apprenticed with his brother James in Boston. As a journeyman printer in England and in Philadelphia, Franklin picked up the fragments of knowledge which made him one of the most heroic figures of an heroic age. With a fellow workman Hugh Meredith, Franklin began his own publishing house, bought the *Pennsylvania Gazette* and made it liberal and clever, and began *Poor Richard's Almanack* which made Poor Richard into wealthy Ben. One of the most clever men of the time, Franklin used his printing press to argue for the financial changes which might have saved the Colonies for England. He pamphleteered for the formation of a Pennsylvania militia, and, ultimately, for the independency for the American States. Franklin encouraged Paine to come to the new world in 1774, to become editor of the *Pennsylvania Magazine*. Another man for the age, Paine helped to create the new nation and also served as a volunteer pamphleteer in the Continental Army during the War of Independence.

Newspaper-printers served an eminently active part in the American Revolution. William Bradford, a later editor of the *Pennsylvania Journal*, also served as a soldier-editor of the Revolution. During the British occupation of New York City revolutionary newspapers were printed further north of the Hudson River. When Newport, Rhode Island was captured by the British Army, printer Solomon Southwick buried his press and type. After the British were driven out, the printer exhumed his tools and with difficulty continued publication.

Now let us step back for a moment from the time of the American Revolution to consider this thing called printing.

In the first place, modern society, as we know it, simply could not exist without printing, without thought formed by words and cemented by the printing press. Printing has been the single indispensible tool for the formation of new knowledge and the preservation of old wisdom. Printing has also provided us with education; information, amusement; it has worked for the distribution of goods and services; it prints our money; makes our stamps and brands identification.

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all showings leaded one point

ALPHATYPE CORPORATION • 7500 McCORMICK • SKOK

EXHIBIT A

ALPHATYPE FONT COMBINATION

Bodoni/*Bodoni Italic*

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Benjamin Franklin served his apprenticeship with his brother James in Boston. As a journeyman printer in Philadelphia and in England, Franklin picked up the fragments of knowledge that made him one of the most

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abcdefghijklmnopqrstuvwxyz 0123456789
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all showings leaded one point

ALPHATYPE FONT COMBINATION

Caledo/Caledo Bold

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6 Caledo MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTE Modern composition depends on the refreshing character of current designs fo 0123456789$	7 3.6	6 Caledo Bold MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTE Modern composition depends on the refreshing character of current designs fo 0123456789$
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12 Caledo MODERN COMPOSITION DEPENDS ON T Modern composition depends on the refreshin 0123456789$	12 2.14	12 Caledo Bold MODERN COMPOSITION DEPENDS ON T Modern composition depends on the refreshin 0123456789$
14 Caledo MODERN COMPOSITION DEPENDS O Modern composition depends on the refres 0123456789$	13 1.98	14 Caledo Bold MODERN COMPOSITION DEPENDS O Modern composition depends on the refres 0123456789$
16 Caledo MODERN COMPOSING DEPENDS Modern composition depends on the r 0123456789$	15 1.71	16 Caledo Bold MODERN COMPOSING DEPENDS Modern composition depends on the r 0123456789$
18 Caledo MODERN COMPOSITION DE Modern composition depends on 0123456789$	17 1.52	18 Caledo Bold MODERN COMPOSITION DE Modern composition depends on 0123456789$

set size
characters per pica

Benjamin Franklin served his apprenticeship with his brother James in Boston. As a journeyman printer in England and in Philadelphia, Franklin picked up the fragments of knowledge that made him one of the most heroic figures of an heroic age. With a fellow workman Hugh Meredith, Franklin began his own printing house bought the **Pennsylvania Gazette** and made it liberal and clever, and started **Poor Richard's Almanack** which made Poor Richard into wealthy Ben. One of the most part in the American Revolution. William Bradford, a later editor of the **Pennsylvania Journal**, served as the soldier-editor of the Revolution. During the British occupation of New York, revolutionary newspapers were

ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz 0123456789
ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz 0123456789

ALPHATYPE FONT COMBINATION

Century Text/*Italic*

6 Century Text
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARAC
Modern composition depends on the refreshing character of current designs fo
0123456789$

7 / 3.75

6 Century Text Italic
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARAC
Modern composition depends on the refreshing character of current designs fo
0123456789$

7 Century Text
MODERN COMPOSITION DEPENDS ON THE REFRESHING C
Modern composition depends on the refreshing character of current d
0123456789$

8 / 3.29

7 Century Text Italic
MODERN COMPOSITION DEPENDS ON THE REFRESHING C
Modern composition depends on the refreshing character of current d
0123456789$

8 Century Text
MODERN COMPOSITION DEPENDS ON THE REFRES
Modern composition depends on the refreshing character of c
0123456789$

9 / 2.92

8 Century Text Italic
MODERN COMPOSITION DEPENDS ON THE REFRES
Modern composition depends on the refreshing character of c
0123456789$

9 Century Text
MODERN COMPOSITION DEPENDS ON THE REFR
Modern composition depends on the refreshing character
0123456789$

9½ / 2.77

9 Century Text Italic
MODERN COMPOSITION DEPENDS ON THE REFR
Modern composition depends on the refreshing character
0123456789$

10 Century Text
MODERN COMPOSITION DEPENDS ON THE R
Modern composition depends on the refreshing char
0123456789$

10½ / 2.51

10 Century Text Italic
MODERN COMPOSITION DEPENDS ON THE R
Modern composition depends on the refreshing char
0123456789$

11 Century Text
MODERN COMPOSING DEPENDS ON THE
Modern composition depends on the refreshing
0123456789$

11½ / 2.45

11 Century Text Italic
MODERN COMPOSING DEPENDS ON THE
Modern composition depends on the refreshing
0123456789$

12 Century Text
MODERN COMPOSITIONS DEPENDS O
Modern compositions depends on the refresh
0123456789$

12½ / 2.37

12 Century Text Italic
MODERN COMPOSITIONS DEPENDS O
Modern compositions depends on the refresh
0123456789$

14 Century Text
MODERN COMPOSITION DEPEND
Modern composition depends on the re
0123456789$

14 / 1.87

14 Century Text Italic
MODERN COMPOSITION DEPEND
Modern composition depends on the re
0123456789$

14 Century Text (E)
MODERN COMPOSITION DEPENDS
Modern composition depends on the refr
0123456789$

14 / 1.91 / 1.95

14 Century Text Italic (E)
MODERN COMPOSITION DEPENDS
Modern composition depends on the refr
0123456789$

set size / characters per pica

Printer Benjamin Franklin apprenticed with his brother James in Boston. As a journeyman printer in Philadelphia and in England, Franklin picked up the fragments of knowledge which made him one of the most heroic figures of an heroic age. With Hugh Meredith, a fellow workman, Franklin began his own printing house, purchased the *Pennsylvania Gazette* and made it liberal and clever, and then started *Poor Richard's Almanack* which made Poor Richard into wealthy Ben. One of the cleverest men of all times Franklin used his printing press to argue for many financial changes that may have saved the Colonies for England, pamphleteered for the formation of a Pennsylvania militia, and, ultimately, for independency for the American States. Franklin encouraged Paine to come to the new world in 1774, to become editor of the *Pennsylvania Magazine*. Another man for the age, Paine helped to create the new nation and served as a volunteer pamphleteer in the Army during the War of Independence.

Newspaper-printers served an eminently active part in the American Revolution. The editor of the *Pennsylvania Journal*, William Bradford, served as a soldier-editor of the Revolution. During the time of the British occupation of New York, revolutionary

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ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz 0123456789

all showings leaded one point

ALPHATYPE FONT COMBINATION

English/*English Italic*

6 English
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACT
Modern composition depends on the refreshing character of current designs
0123456789$

7
3.84

7 English
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHAR
Modern composition depends on the refreshing character of current de
0123456789$

7.5
3.56

8 English
MODERN COMPOSITION DEPENDS UPON THE REFRESHI
Modern composition depends upon the refreshing character of curr
0123456789$

8
3.35

9 English
MODERN COMPOSITION DEPENDS ON THE REFRE
Modern composition depends on the refreshing character of
0123456789$

9
2.97

10 English
MODERN COMPOSITION DEPENDS UPON THE
Modern composition depends upon the refreshing cha
0123456789$

10
2.66

11 English
MODERN COMPOSITION DEPENDS ON THE
Modern composition depends on the refreshing c
0123456789$

11
2.43

12 English
MODERN COMPOSITION DEPENDS ON T
Modern composition depends on the refreshin
0123456789$

12
2.23

14 English
MODERN COMPOSITION DEPEND
Modern composition depends on the re
0123456789$

14
1.91

set size
characters per pica

The printer Benjamin Franklin apprenticed with his brother James in Boston. As a journeyman printer in England and in Philadelphia, Franklin picked up the fragments of knowledge that made him one of the most heroic figures of an heroic age. With a fellow workman named Hugh Meredith, Franklin began his own printing house, bought the *Pennsylvania Gazette* and made it liberal and clever, started *Poor Richard's Almanack* that made Poor Richard into wealthy Ben. One of the most clever men of all time, Franklin used his printing press to argue for financial changes which might have saved the Colonies for England, pamphleteered for the formation of a Pennsylvania militia, and ultimately for the independency for the American States. Franklin encouraged Paine to come to the new world in 1774, to become editor of the *Pennsylvania Magazine.* Another man for the age, Paine also helped to create the new nation and served as a volunteer pamphleteer in the Continental Army during the War of Independence.

6 English Italic
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACT
Modern composition depends on the refreshing character of current designs
0123456789$

7 English Italic
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHAR
Modern composition depends on the refreshing character of current de
0123456789$

8 English Italic
MODERN COMPOSITION DEPENDS UPON THE REFRESHI
Modern composition depends upon the refreshing character of curr
0123456789$

9 English Italic
MODERN COMPOSITION DEPENDS ON THE REFRE
Modern composition depends on the refreshing character of
0123456789$

10 English Italic
MODERN COMPOSITION DEPENDS UPON THE
Modern composition depends upon the refreshing cha
0123456789$

11 English Italic
MODERN COMPOSITION DEPENDS ON THE
Modern composition depends on the refreshing c
0123456789$

12 English Italic
MODERN COMPOSITION DEPENDS ON T
Modern composition depends on the refreshin
0123456789$

14 English Italic
MODERN COMPOSITION DEPEND
Modern composition depends on the re
0123456789$

The newspaper-printers served an active part in the American Revolution. William Bradford, a later editor of the *Pennsylvania Journal,* served as a soldier and editor of the Revolution. During the British occupation of New York, revolutionary newspapers were printed further up the Hudson River. When Newport in Rhode Island was taken by the British, the printer Solomon Southwick buried his press and type. After the British were driven out, the printer exhumed his tools and with difficulty continued publication.

Now let's step back for a moment from the time of the American Revolution to consider this thing called printing.

In the first place, modern society, as we know it

ABCDEFGHIJKLMNOPQRSTUVWXYZ
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ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz 01234567890

ALPHATYPE FONT COMBINATION

Garamond/*Garamond Italic*

6 Garamond
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTE
Modern composition depends on the refreshing character of current designs for
0123456789$

7
3.88

6 Garamond Italic
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTE
Modern composition depends on the refreshing character of current designs for
0123456789$

7 Garamond
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHAR
Modern composition depends on the refreshing character of current design
0123456789$

7.5
3.71

7 Garamond Italic
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHAR
Modern composition depends on the refreshing character of current design
0123456789$

8 Garamond
MODERN COMPOSITION DEPENDS ON THE REFRESHING CH
Modern composition depends on the refreshing character of current de
0123456789$

8
3.49

8 Garamond Italic
MODERN COMPOSITION DEPENDS ON THE REFRESHING CH
Modern composition depends on the refreshing character of current de
0123456789$

9 Garamond
MODERN COMPOSITION DEPENDS ON THE REFRESHING
Modern composition depends on the refreshing character of curren
0123456789$

8.5
3.29

9 Garamond Italic
MODERN COMPOSITION DEPENDS ON THE REFRESHING
Modern composition depends on the refreshing character of curren
0123456789$

10 Garamond
MODERN COMPOSITION DEPENDS ON THE REFRE
Modern composition depends on the refreshing character of
0123456789$

9.5
2.95

10 Garamond Italic
MODERN COMPOSITION DEPENDS ON THE REFRE
Modern composition depends on the refreshing character of
0123456789$

11 Garamond
MODERN COMPOSITION DEPENDS ON THE REF
Modern composition depends on the refreshing characte
0123456789$

10
2.58

11 Garamond Italic
MODERN COMPOSITION DEPENDS ON THE REF
Modern composition depends on the refreshing characte
0123456789$

12 Garamond
MODERN COMPOSITION DEPENDS ON THE
Modern composition depends on the refreshing cha
0123456789$

11
2.33

12 Garamond Italic
MODERN COMPOSITION DEPENDS ON THE
Modern composition depends on the refreshing cha
0123456789$

14 Garamond
MODERN COMPOSITION DEPENDS O
Modern composition depends on the refresh
0123456789$

13
2.00

14 Garamond Italic
MODERN COMPOSITION DEPENDS O
Modern composition depends on the refresh
0123456789$

set size
characters per pica

Printer Benjamin Franklin apprenticed with his brother James in Boston. As a journeyman printer in Philadelphia and in England, Franklin picked up the fragments of knowledge which made him one of the most heroic figures of an heroic age. With a fellow workman named Hugh Meredith Franklin started with own printing house. He purchased the *Pennsylvania Gazette,* made it liberal and clever, and started *Poor Richard's Almanack,* which made Poor Richard into wealthy Ben. One of the cleverest men of all time, Franklin used his printing press to argue for financial changes which might have saved the Colonies for England, pamphleteered for the formation of a Pennsylvania militia, and, ultimately for independency of the States. Franklin encouraged Paine to come to the new world in 1774, to become the editor of the *Pennsylvania Magazine.* Another man for the age, Paine also helped to create the new nation and served as a volunteer pamphleteer in the Continental Army during the War.

Newspaper-printers served an eminently active part in the American Revolution. The editor of the *Pennsylvania Journal,* a later William Bradford, served as a soldier-editor of the Revolution. During the British occupation of New York, revolutionary newspapers were printed further up the Hudson River. When Newport, Rhode Island was taken by the British, printer Solomon Southwick buried his press and type. After the British were driven out, the printer exhumed his tools and with difficulty continued publication.

Now let's step back for a moment from the American Revolution to consider this thing called printing.

In the first place, modern society, as we know it, just could not exist without printing, without thought formed by words and cemented by the printing press. Printing has been the single indispensible tool for the formation of new knowledge and the preservation of old wisdom. Printing has also provided us with education; information, amusement; it has worked for the distribution of goods and services; it even makes our stamps, brands identification and prints money.

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ABCDEFGHIJKLMNOPQRSTUVWXYZ
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ALPHATYPE FONT COMBINATION — Patina/**Patina Semibold**

6 Patina
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTE
Modern composition depends on the refreshing character of current designs for
0123456789$

7 | 3.80

7 Patina
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARA
Modern composition depends on the refreshing character of current desig
0123456789$

7.5 | 3.56

8 Patina
MODERN COMPOSITION DEPENDS ON THE REFRESHING CH
Modern composition depends on the refreshing character of current d
0123456789$

8 | 3.32

9 Patina
MODERN COMPOSITION DEPENDS ON THE REFRESHI
Modern composition depends on the refreshing character of c
0123456789$

9 | 2.97

10 Patina
MODERN COMPOSITION DEPENDS ON THE REF
Modern composition depends on the refreshing charact
0123456789$

10 | 2.67

11 Patina
MODERN COMPOSITION DEPENDS ON THE
Modern composition depends on the refreshing ch
0123456789$

11 | 2.42

12 Patina
MODERN COMPOSITION DEPENDS ON T
Modern composition depends on the refreshi
0123456789$

12 | 2.22

14 Patina
MODERN COMPOSITION DEPENDS
Modern composition depends on the refr
0123456789$

13.5 | 1.98

16 Patina
MODERN COMPOSITION DEPE
Modern composition depends on th
0123456789$

15.5 | 1.71

18 Patina
MODERN COMPOSITION D
Modern composition depends o
0123456789$

17.5 | 1.52

18 Patina (E)
MODERN COMPOSITION DE
Modern composition depends on t
0123456789$

18 | 1.65

set size
characters per pica

Benjamin Franklin served his apprenticeship with his brother, James, in Boston. As a journeyman printer in Philadelphia and in England, Franklin picked up the fragments of knowledge that made him one of the most heroic figures of an heroic age. With a fellow workman named Hugh Meredith, Franklin began his own printing house, purchased the **Pennsylvania Gazette** and made it liberal and clever, started **Poor Richard's Almanack**

6 Patina Semibold
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTE
Modern composition depends on the refreshing character of current designs for
0123456789$

7 Patina Semibold
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARA
Modern composition depends on the refreshing character of current desig
0123456789$

8 Patina Semibold
MODERN COMPOSITION DEPENDS ON THE REFRESHING CH
Modern composition depends on the refreshing character of current d
0123456789$

9 Patina Semibold
MODERN COMPOSITION DEPENDS ON THE REFRESHI
Modern composition depends on the refreshing character of c
0123456789$

10 Patina Semibold
MODERN COMPOSITION DEPENDS ON THE REF
Modern composition depends on the refreshing charact
0123456789$

11 Patina Semibold
MODERN COMPOSITION DEPENDS ON THE
Modern composition depends on the refreshing ch
0123456789$

12 Patina Semibold
MODERN COMPOSITION DEPENDS ON T
Modern composition depends on the refreshi
0123456789$

14 Patina Semibold
MODERN COMPOSITION DEPENDS
Modern composition depends on the refr
0123456789$

16 Patina Semibold
MODERN COMPOSITION DEPE
Modern composition depends on th
0123456789$

18 Patina Semibold
MODERN COMPOSITION D
Modern composition depends o
0123456789$

18 Patina Semibold (E)
MODERN COMPOSITION DE
Modern composition depends on t
0123456789$

which made Poor Richard into wealthy Ben. One of the most clever men of all time, Franklin used his printing press to argue for financial changes which might have

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all showings leaded one point

ALPHATYPE FONT COMBINATION

Claro/Claro Demibold

5 Claro
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTER
Modern composition depends on the refreshing character of current designs f
0123456789$

6½ / 3.75

5 Claro Demibold
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTER
Modern composition depends on the refreshing character of current designs f
0123456789$

6 Claro
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARA
Modern composition depends on the refreshing character of current de
0123456789$

7 / 3.50

6 Claro Demibold
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARA
Modern composition depends on the refreshing character of current de
0123456789$

7 Claro
MODERN COMPOSITION DEPENDS ON THE REFRESHING CH
Modern composition depends on the refreshing character of curre
0123456789$

7½ / 3.29

7 Claro Demibold
MODERN COMPOSITION DEPENDS ON THE REFRESHING CH
Modern composition depends on the refreshing character of curre
0123456789$

8 Claro
MODERN COMPOSITION DEPENDS ON THE REFRESHING
Modern composition depends on the refreshing character of c
0123456789$

8 / 3.05

8 Claro Demibold
MODERN COMPOSITION DEPENDS ON THE REFRESHING
Modern composition depends on the refreshing character of c
0123456789$

9 Claro
MODERN COMPOSITION DEPENDS ON THE REFRE
Modern composition depends on the refreshing charac
0123456789$

9 / 2.71

9 Claro Demibold
MODERN COMPOSITION DEPENDS ON THE REFRE
Modern composition depends on the refreshing charac
0123456789$

10 Claro
MODERN COMPOSITION DEPENDS ON THE R
Modern composition depends on the refreshing c
0123456789$

10 / 2.44

10 Claro Demibold
MODERN COMPOSITION DEPENDS ON THE R
Modern composition depends on the refreshing c
0123456789$

11 Claro
MODERN COMPOSITION DEPENDS ON T
Modern composition depends on the refres
0123456789$

11½ / 2.12

11 Claro Demibold
MODERN COMPOSITION DEPENDS ON T
Modern composition depends on the refres
0123456789$

12 Claro
MODERN COMPOSITION DEPENDS O
Modern composition depends on the refr
0123456789$

12 / 2.03

12 Claro Demibold
MODERN COMPOSITION DEPENDS O
Modern composition depends on the refr
0123456789$

14 Claro
MODERN COMPOSITION DEPEN
Modern composition depends on th
0123456789$

14 / 1.74

14 Claro Demibold
MODERN COMPOSITION DEPEN
Modern composition depends on th
0123456789$

16 Claro
MODERN COMPOSING DEP
Modern composition depends
0123456789$

16½ / 1.49

16 Claro Demibold
MODERN COMPOSING DEP
Modern composition depends
0123456789$

14 Claro (E)
MODERN COMPOSITION DEPEN
Modern composition depends on th
0123456789$

14 / 1.75 / 1.65

set size / characters per pica

14 Claro Demibold (E)
MODERN COMPOSITION DEPEN
Modern composition depends on t
0123456789$

The printer Benjamin Franklin apprenticed with his brother in Boston. As a journeyman printer in England and in Philadelphia, Franklin absorbed the fragments of knowledge that made him one of the most heroic figures purchased the **Pennsylvania Gazette** and made it liberal

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all showings leaded one point

ALPHATYPE FONT COMBINATION

Futura Medium/**Futura Demibold**

6 Futura Medium
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTER OF CURREN
Modern composition depends on the refreshing character of current design for bett
0123456789$

6 / 4.07

6 Futura Demibold
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTER OF CURREN
Modern composition depends on the refreshing character of current design for bett
0123456789$

7 Futura Medium
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTER OF
Modern composition depends on the refreshing character of current desig
0123456789$

7 / 3.62

7 Futura Demibold
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTER OF
Modern composition depends on the refreshing character of current desig
0123456789$

8 Futura Medium
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACT
Modern composition depends on the refreshing character of curren
0123456789$

8 / 3.29

8 Futura Demibold
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACT
Modern composition depends on the refreshing character of curren
0123456789$

9 Futura Medium
MODERN COMPOSITION DEPENDS ON THE REFRESHING CH
Modern composition depends on the refreshing character o
0123456789$

9 / 2.92

9 Futura Demibold
MODERN COMPOSITION DEPENDS ON THE REFRESHING CH
Modern composition depends on the refreshing character o
0123456789$

10 Futura Medium
MODERN COMPOSITION DEPENDS ON THE REFRESHI
Modern composition depends on the refreshing chara
0123456789$

10 / 2.61

10 Futura Demibold
MODERN COMPOSITION DEPENDS ON THE REFRESHI
Modern composition depends on the refreshing chara
0123456789$

11 Futura Medium
MODERN COMPOSITION DEPENDS ON THE REFR
Modern composition depends on the refreshing c
0123456789$

11 / 2.37

11 Futura Demibold
MODERN COMPOSITION DEPENDS ON THE REFR
Modern composition depends on the refreshing c
0123456789$

12 Futura Medium
MODERN COMPOSITION DEPENDS ON THE R
Modern composition depends on the refresh
0123456789$

12 / 2.18

12 Futura Demibold
MODERN COMPOSITION DEPENDS ON THE R
Modern composition depends on the refresh
0123456789$

14 Futura Medium
MODERN COMPOSITION DEPENDS ON
Modern composition depends on the r
0123456789$

14 / 1.87

14 Futura Demibold
MODERN COMPOSITION DEPENDS ON
Modern composition depends on the r
0123456789$

16 Futura Medium
MODERN COMPOSITION DEPEND
Modern compositions depends on
0123456789$

16 / 1.64

16 Futura Demibold
MODERN COMPOSITION DEPEND
Modern composition depends on t
0123456789$

18 Futura Medium
MODERN COMPOSING DEPEN
Modern composing depends o
0123456789$

18 / 1.46

18 Futura Demibold
MODERN COMPOSING DEPEN
Modern composing depends o
0123456789$

set size / characters per pica

Benjamin Franklin, printer, apprenticed with his brother James in Boston. As a journeyman printer in Philadelphia and in England, Franklin picked up the fragments of knowledge which made him one of the most heroic figures of an heroic age. With a fellow workman named Hugh Meredith, Franklin started his own printing house, bought the **Pennsylvania Gazette** made it liberal and clever, and started **Poor Richard's Almanack** that made Poor Richard into wealthy Ben.

ABCDEFGHIJKLMNOPQRSTUVWXYZ
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ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz 0123456789

all showings leaded one point

ALPHATYPE FONT COMBINATION

Versatile 45/*Versatile 46*

[illegible]
[illegible]
[illegible]
0123456789$

7
3.84

6 Versatile 46
[illegible]
[illegible]
[illegible]

[illegible]
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTE
Modern composition depends on the refreshing character of current desi
[illegible]

7.5
3.60

[illegible]
MODERN COMPOSITION DEPENDS ON THE REFRESHING CHARACTE
[illegible]
0123456789$

8 Versatile 45
MODERN COMPOSITION DEPENDS ON THE REFRESHING CH
Modern composition depends on the refreshing character of cu
0123456789$

8.5
3.17

8 Versatile 46
MODERN COMPOSITION DEPENDS ON THE REFRESHING CH
Modern composition depends on the refreshing character of cu
0123456789$

9 Versatile 45
MODERN COMPOSITION DEPENDS ON THE REFRESHI
Modern composition depends on the refreshing character
0123456789$

9.5
2.82

9 Versatile 46
MODERN COMPOSITION DEPENDS ON THE REFRESHI
Modern composition depends on the refreshing character
0123456789$

10 Versatile 45
MODERN COMPOSITION DEPENDS ON THE R
Modern composition depends on the refreshing c
0123456789$

11
2.44

10 Versatile 46
MODERN COMPOSITION DEPENDS ON THE R
Modern composition depends on the refreshing c
0123456789$

11 Versatile 45
MODERN COMPOSITION DEPENDS ON TH
Modern composition depends on the refreshi
0123456789$

12
2.24

11 Versatile 46
MODERN COMPOSITION DEPENDS ON TH
Modern composition depends on the refreshi
0123456789$

12 Versatile 45
MODERN COMPOSITION DEPENDS ON
Modern composition depends on the refre
0123456789$

13
2.07

12 Versatile 46
MODERN COMPOSITION DEPENDS ON
Modern composition depends on the refre
0123456789$

14 Versatile 45
MODERN COMPOSITION DEPENDI
Modern composition depends on the
0123456789$

15
1.79

14 Versatile 46
MODERN COMPOSITION DEPENDI
Modern composition depends on the
0123456789$

16 Versatile 45 (E)
MODERN COMPOSITIONS D
Modern compositions depends
0123456789$

16
1.53

16 Versatile 46 (E)
MODERN COMPOSITIONS D
Modern compositions depends
0123456789$

set size
characters per pica

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Newspaper-printers served an eminently active part in the American Revolution. The editor of the *Pennsylvania Journal,* a later William Bradford, served as a soldier and editor of the Revolution. During the British occupation of New York, revolutionary newspapers were printed further up the Hudson River. When Newport, Rhode Island was captured by the British, the printer Solomon Southwick buried his press and type. After the British were driven out the printer exhumed his tools and with difficulty continued

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ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz 0123456789

all showings leaded one point

TORY INITIALS

72 Point, per set (24 characters) $8.00 — Single character 65c

A 7201	B 7202	C 7203	D 7204
E 7205	F 7206	G 7207	H 7208
I 7209	J 7210	K 7211	L 7212
M 7213	N 7214	O 7215	P 7216
Q 7217	R 7218	S 7219	T 7220
U 7221	V 7222	W 7223	Y 7224

EXHIBIT B

West Festival D

SOUSA'S STARS AND STRIPES FOREVER

SOUSA'S STARS AND STRIPES FOREVER

SOUSA'S STARS AND STRIPES FOREVER

West Festival Ornamental E

5558a HUDSON HOLIDAY CRUISE TO WEST PO

5558b HUDSON HOLIDAY CRUISE TO WEST PO

5558c HUDSON HOLIDAY CRUISE TO WEST PO

Battle Hymn A

Mine Eyes Have Seen the Glor

Mine Eyes Have Seen the Glor

Mine Eyes Have Seen the Glor

Battle Hymn B

BATTLE HYMN of the Repub

BATTLE HYMN of the Repub

BATTLE HYMN of the Repub

EXHIBIT C

Exhibit D

The Copyrightability of Typography and Regulation Section 202.1(a)

(By Harriet L. Oler, Attorney for Examining; July 1971, September 1972; Docket No. T–7)

GENERAL INTRODUCTION

Section 202.1(a) of the Regulations of the Copyright Office (as amended through April 21, 1966) lists among the material not subject to copyright "mere variations of typographic ornamentation, lettering or coloring . . ." [1] The validity of this Regulation has been called into question as a result of recent applications for registration of claims to copyright in various allegedly original type fonts and colored designs.

Office practice heretofore has been to reject, as not containing sufficient authorship to support a registration, (1) any form of lettering or typography other than "[a] decorative letter" that "can stand by itself as a drawing, etching, or print" [2] and (2) "color combinations of the same basic design." [3] It has been suggested at recent Register's Conference and Examining Division Conference meetings that the Office depart from these practices to register both "typography" and "coloring."

With a view toward examining the legality and desirability of changing our Office practices in these areas, I have been asked to prepare "a study that would result in a clear statement interpreting the meaning of [this portion of] the Regulation today in light of cases and developments since 1954." [4] The study does not re-evaluate Office practices concerning material presently considered registrable as works of art: viz, decorative letters and the like.

Mrs. Harris, of the Arts Examining Section, has been asked to prepare a concurrent report on recent trends in modern art. Hopefully, my study will unearth the legal groundwork upon which a fresh, uniform set of Office practices regarding "typography" and coloring can be constructed.

I. INTRODUCTION

Preliminary to this discussion of the copyrightability and registrability of what is denoted, both in practice and in regulation, "typography," it seems useful to pinpoint precisely what is embraced by this term, and to establish the terminology to be used throughout the report. The term as generally used in the copyright context comprises three separate printing products, each of which involves different copyright concepts and each of which will be treated separately in the context of suggested Office practices. It is assumed that the word "typography" as used in the current regulation embraces all three.[5]

The first type of product commonly included in the term "typography" is a type face or character. A type face, according to Webster, is "[t]he face of a type, especially with reference to its shape, form, model, or character." [6] As used here, the term denotes the visual image of a single letter.

The second of these products, type font, embrances "[a]n assortment of type of one size and style. . . ." [7] It includes the sum total of the letters in a particular type style, regardless of their position or order of combination on a page.

Finally, "typography" generally comprises what Webster specifically calls typography: ". . . the style, arrangement, or appearance of matter printed from type." [8] It refers to the layout or appearance of a particular printed page, rather than to the specific style of type or shape of individual letters thereon.

The copyrightability of these types of material, and particularly of type fonts,

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[1] Copyright Office Regulations, 37 C.F.R. § 202.1(a) (1966).

[2] Memo from H. Oler to R. Glasgow on "Non-Registrability of Typography: the ——— Appeal", Oct. 28, 1969 (unpublished collection of Oler memos found in the Copyright Office Library).

[3] Memo from R. Glasgow to A. Goldman on "Disposition of the Work Entitled 'Alphabet for ———' " Jan. 12, 1971 (unpublished inter-Office memo).

[4] *Ibid.*

[5] Memo from R. Glasgow to H. Oler on "Typefaces and Coloring: Analysis of Section 202.1(a) of the Regulations Prohibiting Copyright in 'mere variations of typographic ornamentation, lettering or coloring'," Mar. 10, 1971 (unpublished inter-Office memo).

[6] Webster's *New International Dictionary* (2d Ed. 1946).

[7] *Ibid.*

[8] *Ibid.*

was called into question by the recent submission of three claims to copyright. The ——— Company submitted a work entitled ——— Century Typeface [9] consisting of a four-line listing of the capital letters of the alphabet (A through Z, in alphabetical order) and the numerals (zero through nine, in numerical order). Claimant's attorney sought registration on the grounds that the work was original in that it was a "novel composite of parallelograms, both of the elongate side and the equilateral side form. In the case of certain letters, the parallelograms have cut corners including also straight bars joining various letter segments." [10] This claim was rejected by the Office.

Second, on September 14, 1970, Mr. ——— submitted a Class G application for registration of a work entitled Alphabet for ———, listing the "nature of the work" in the application as "design for alphabet." The work consisted of a drawing of a uniform alphabet with the addition of very simple scroll features. The disposition of this case has been held up, pending completion of this study and follow-up meetings with the Office.

Finally, the ——— Company of New York has met with representatives of the Office on two occasions to discuss possible registration for its allegedly original newspaper type font.[11] On both occasions, the company demonstrated the involved process of creating a new and salable type font (called ———) for newspaper use.[12] The company urges statutory copyright protection for its work product, because the process of its creation is both risky, and expensive. Statutory protection was heretofore unnecessary (from a business point of view), said company representatives, because of the difficulty (i.e., expense and time) involved in copying a competitor's type font. However, modern photographic processes make copying matrices and even inked proofs relatively easy and inexpensive.[13] Too, the existence of photographic typesetting devices encourages copying to produce types compatible with these new machines.[14] Design patent does not offer satisfactory protection, said company representatives; [15] and they

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[9] Discussed more fully in memo from H. Oler to R. Glasgow, *supra* note 2.

[10] Letter from Augustus Douvas, Esq. to Miss Dorothy Schrader, Head, Arts Examining Section of the Copyright Office, August 15, 1969.

[11] On August 19, 1970, four attorneys from the Copyright Office (Mr. Glasgow, Miss Ringer, Mr. Dietz and Mrs. Oler) visited the ——— Company in ——— New York. Subsequently, on January 27, 1971, several Company officials reciprocated the visit to discuss further the possibility of copyright registration for their type fonts. Office participants at this meeting were: Mr. Cary, Mr. Goldman, Miss Ringer, Mr. Moore, Mr. Glasgow, Mr. Levine, Miss Schrader, Mr. Dietz, Mr. Hadl, Mr. Froelich and Mrs. Oler. These sessions are hereafter referred to as the ——— meetings.

[12] The process outlined at the ——— meetings typically involves the following steps:

(1) researching market needs and comparing the Company's Catalog of type fonts with those of competitors;

(2) making initial drawings of letters;

(3) making polished drawings for quick trials on linofilm machines;

(4) making sets for comparison with existing type fonts;

(5) printing up pages for comparison with pages printed with existing type fonts;

(6) making manufacturing or engineering drawings for use on actual machines;

(7) making experimental settings on newspaper machines to test the effects of high speed printing on the proposed font;

(8) drawing capitals, associated boldface, italics and numerals and running them through the comparison and quick trial stages;

(9) producing the font on a linotype machine and distributing it to manufacturers for critical appraisal; and

(10) marketing the font.

[13] *See* C. Swann, *Techniques of Typography* (1969).

[14] A. Lawson "The Discouraging Lot of the Type Designer" (Sept. 1970) (photocopy in Copyright Office Library).

[15] This statement seems to be legally sound. In Goudy v. Hansen, 247 Fed. 782 (1st Cir. 1917), *cert. denied,* 246 U.S. 667 (1918), the First Circuit Court of Appeals voided a design patent in a design for a font of type on grounds that the subject matter was not patentable, and that neither the type characters, imprints, nor metal blocks upon which they were cut possessed sufficient "peculiar configuration or ornamentation" to justify a design patent. 247 Fed. 782, 785.

The first ground was subsequently overruled to the extent that a design for a font of type was held to be patentable subject matter within the meaning of the statute. Cooper v. Robertson, 38 F. 2d 852 (D.C.D. Md. 1930), citing, *inter alia,* Keystone Type Foundry v. Wynkoop, 239 F. 355 (S.D.N.Y. 1916). But no later case has been found upholding a design patent in a font analogous (in terms of the amount of original artistic expression to ———'s).

At both ——— meetings, their spokesman stated that no design patents have been issued since 1946 for commercially valuable type fonts, and it was therefore their unanimous opinion that enforceable design patent protection is not available for their product.

This opinion held notwithstanding the fact that the Patent Office had recently issued a patent for a type design of sorts. In Ex parte Fishback, the Patent Office Board of Appeals reversed a lower decision and granted a design patent for "the ornamental design for a Set of Sign Panel Letters, Numerals and Symbols." In the course of the decision, the

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therefore determined to pursue the copyright route. To date, no formal applications or briefs have been submitted by ———; but the company plans to submit materials for registration in the near future.[16]

The above cases are set forth as examples of the types of materials for which copyright registration is currently sought. In order to determine the best disposition of those cases yet unresolved and to lay the foundation for establishing a uniform practice on what is broadly referred to as "typography," this paper will briefly review the history and present status of Office practice. It will then discuss recent copyright law bearing on "typography" and, more broadly, trends in law and practice regarding the copyrightability of works of art generally. Finally, each branch of "typography" will be reviewed individually in the above framework and a suggested Office practice for each will be proposed.

II. ISSUES

(1) What practices should the Office follow regarding the registration of claims to copyright in a type face, type fonts, and typography?

(2) Must the current Regulations (Sec. 202.1(a)) be amended to reflect these practices?

III. DISCUSSION

A. History: Statute, Regulations, and Office Practice

The Copyright Law, insofar as it relates to the registrability of the three kinds of typography under consideration, has remained unchanged since 1909. It provides for statutory copyright in all the "writings of an author"[17] and enumerates as copyrightable works, *inter alia*, "[w]orks of art; models or designs for works of art;" and "[d]drawings or plastic works of a scientific or technical character."[18]

A Review of the Regulations of the Copyright Office prior to 1956 disclosed only one specific reference to the subject matter under consideration. The two sets of Regulations printed in 1910 contained the following provision: "Mere ornamental scrolls, combinations of lines and colors, decorative borders, and similar designs or *ornamental letters or forms of type* are not included in the designation 'prints and pictorial illustrations' ".[19]

No other provision was mentioned until 1956, when the present prohibition against copyright registration for "mere variations of typographic ornamentation, lettering or coloring" was adopted.[20]

It codified Office policy in the wake of the Second Circuit's 1952 decision in *G. Ricordi & Co. v. Haendler*[21] (which raised, without answering, the question of the copyrightability of typography) and the Office's follow-up study on the copyrightability of a font of type and the typographical arrangement of a book.[22] Strauss considered whether "designing and engraving a type font is artistic work, and whether the resulting lettering and arrangement is a copyrightable work of art.?"[23] Based on his review of case law (foreign and domestic) and scholarly opinion, Strauss concluded that while some type designs "should

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Board said: ". . . the claimed set of symbols is displayed in connection with border and background features which give a distinctive and characteristic effect supporting appellant's allegations as to design improvement over the reference appearances. While any such display of characters can be analyzed as involving individual features as to letter form, border form, background and slant relationships, it does not appear to us that the art applied leads to applicant's total creation using these elements of symbol presentation. To arrive at the design by piecemeal consideration of references using such elements in one way or another is not difficult but appears to us to be guided by appellant's disclosure rather than by a rationalization giving credence to the view that the design would be obvious to the ordinary observer working from the references alone." 160 USPQ 30 (P.O. Bd. App. 1968).

On the general problem of the absence of protection for type designs, see A. Lawson, *Printing Types: An Introduction* 12–13 (1971).

[16] ——— meeting Jan. 21, 1971.

[17] Copyright Law of the United States, 17 U.S.C. § 4 (1964).

[18] 17 U.S.C. §§ 5(g), 5(i) (1964).

[19] Regulations of 1910, compiled, in Compilation of Regulations Concerning Copyright 1874–1956 (mimeo found in Copyright Office Library) (emphasis added).

[20] Copyright Office Regulations, 37 C.F.R. § 202.1(a) (1956).

[21] G. Ricordi & Co. v. Haendler, 194 F. 2d 914 (2d Cir. 1952).

[22] Memo from W. Strauss to G. Cary on "Copyrightability of a Font of Type and the Typographical Arrangement of a Book", Dec. 22, 1953 (unpublished collection of Strauss memos found in the Copyright Office Library).

[23] *Id.*, at 2.

probably be copyrightable" as works of art, ordinary type and type arrangements have traditionally been denied protection by courts and should not be copyrightable. He drew the line of registrability of a particular work by analyzing its comparative artistic and functional features: "Where a letter, or combination of letters has aesthetic meaning (i.e., incorporates a design) apart from the function of forming words and conveying thoughts, then it may be considered a work of art. . . . A decorative letter, beautiful or ugly, expresses an idea of its own, regardless of its function within the language; it can stand by itself as a drawing, etching or print. Not so ordinary type: None of the letters, alone or in combination, are things of aesthetic appeal; their only purpose is to be read, and if their form is pleasing then reading them is made less tiring. But they have no life apart from their function; they are therefore, not works of art." [24]

Under this standard, legibility was the practical determinant of registrability: "it would be impossible to read a book consisting wholly of decorative type" of the kind he found copyrightable.[25]

Strauss applied a more lenient standard of registrability to advertising type and layout: "Type designing then means more than finding new and artistic forms for existing letters. There must be a feeling of harmony and unbroken rhythm that runs through the whole design, each letter kin to every other and to all. Particularly in the case of advertising art success largely depends on artistic letters and on good layout. The proportionate arrangement and relationship of the various parts: headline and text, main illustration, secondary illustrations must be harmonious and striking, and an unbalanced, incongruous, or monotonous type and layout detracts from the message. Some such type designs should probably be copyrightable." [26]

Although Strauss leaves open the possibility of registration for both excessively decorative letters and some types of advertising layout or typography, the informal Office practice, at least within recent years, acknowledges the possibility of registration only for works in the former category. No Office case has been found or recalled where registration was made for a work consisting solely of the advertising layout or arrangement of unadorned letters of the alphabet.[27]

It remains to be seen whether recent case law or policy considerations suggest a change in this practice.

B. The Law Bearing on "Lettering and Typography"

Most of the proponents of a change in Office practice cite the Pennsylvania District Court's 1960 decision [28] in *Amplex Manufacturing Co. v. A.B.C. Plastic Fabricators, Inc.* as authority. It is the only decision squarely on point. But considering a type face, a type font and typography as different kinds of works, it probably considers the copyrightability only of the latter.[29] Although court guidance is minimal, we should review the few decisions which are relevant to our issues.

The issue of the copyrightability of typography was raised in Judge Learned Hand's decision in *G. Ricordi & Co. v. Haendler*.[30] He found defendant innocent of unfair competition where he photographically copied plaintiff's book after the copyright had expired. Announcing a doctrine of federal preemption for published works, Hand held that regardless of whether typography was copyrightable (under state law or by federal statute), federal, rather than state law must determine whether any part of the work (including typography) was dedicated, since plaintiff "invoked the protection of the Copyright Act over all that appeared" [31] in his work by publishing it with an unlimited copyright notice.

"Did the plaintiff preserve any rights after publication in the book except those granted by the Copyright Act? We may start with the undoubted postulate that, except for some especial typography used to print the libretto and scores, the plaintiff dedicated all its interest to the public. Moreover, it is equally

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[24] *Id.*, at 10.

[25] *Id.*, at 13.

[26] *Id.*, at 4 (footnotes omitted). For a fuller discussion of the Strauss memo, *see* memo from H. Oler to R. Glasgow. *supra* note 2.

[27] This question was discussed informally with present Examining Division Section Heads prior to conducting this study.

[28] Amplex Manufacturing Co. v. A.B.C. Plastic Fabricators, Inc., 184 F. Supp. 285 (E.D. Pa. 1960).

[29] None of the cases explicitly distinguishes between kinds of "typography" in the manner adopted in this paper. yet it is often possible to narrow their discussions from the factual context of the cases.

[30] 194 F. 2d 914 (2d Cir. 1952).

[31] *Id.*, at 915.

clear that if the especial typography was itself copyrightable, it too was dedicated to the public, for it was certainly a part of the 'work.' Therefore, we need consider only the possibility that the typography was not copyrightable. The argument then would be that, since the typography was not copyrighted, the plaintiff did not dedicate it, because no part of a 'work' is to be deemed dedicated which the copyright does not cover; and that it was for the state law to decide whether the publication of the book was a dedication of the typography. However, even though the state law held that publication was not a dedication we should feel bound to disregard it, because the question would still be, not one of state law, but of federal law." [32]

In Hand's exemplary style, the reason for the rule was offered: under federal law, publication of a work with an unlimited copyright notice "would imply that, when the copyright expired, the 'work' in all its aspects would be in the public demesne. After the copyright did expire, the public would certainly understand that they might reproduce the book without any limitation, and if it was permissible to prevent their doing so photographically, that expectation would be defeated." [33]

By way of *dicta*, the *Ricordi* opinion made two statements noteworthy for our study. First, it implied that "ordinary" typography, at least, is not copyrightable. "[W]e may start with that undoubted postulate that, except for some especial typography . . . the plaintiff dedicated all its interest to the public." [34] Thus, whatever common law rights the plaintiff might have possessed in ordinary typography did not survive publication in the copyright sense, because such subject matter was not statutorily copyrightable. The opinion cited no authority for this postulate.

Second, the opinion raised the question of whether plaintiff might, by using a special notice of reservation of rights in typography, have preserved common law rights in the typography even after the work itself entered the public domain.

"Such a secret limitation upon the apparent dedication of the 'work' seems to us inconsistent with the exercise of the other rights of copying which by hypothesis the dedication indubitably would include. Whether this result could be avoided by annexing to the copyright notice a reservation of the 'author's' rights in the typography we need not say; for there was no such reservation." [35]

The possibility remained open, since plaintiffs' work did not contain a restricted notice.

For all its unanswered queries, *Ricordi* remains the law; and it was cited with approval in the more recent case of *Desclee & Cie., S.A. v. Nemmers.* [36] There, plaintiff brought an action for unfair competition to enjoin the photographic reproduction of published Gregorian chants annotated with Solesmes rhythmic signs.[37] The court denied relief, on grounds that the rhythmic annotation, indicating the manner of performance of Gregorian chants, were an integral part of the copyrightable musical composition; that there is no reservation of rights in the typography of a published work; [38] that the exclusive remedy for wrongful copying was that afforded by the Copyright Law; and that plaintiff had failed to establish a case of unfair competition.[39]

The nature of Desclee's interest was clearly set forth: ". . . Desclee's interest in the property which was photocopied may be analyzed as consisting of the intellectual content or subject matter; that is, the Solesmes annotations, and the concrete, physical form employed to convey and publish this content; that is, the type characters, layout, and composition of the typography." [40]

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[32] *Ibid.*

[33] *Ibid.*

[34] *Ibid.* This postulate followed the Court's avowed assumption that the case of E. P. Dutton & Co. v. Cupples, 117 App. Div. 172, 102 N.Y.S. 309 (1907), stood for the proposition that a work "profusely illustrated with illuminated capitals" may be protected by unfair competition against photographic copying when it has never been copyrighted. 194 F. 2d at 915.

[35] *Id.*, at 915–16.

[36] Desclee & Cie., S.A. v. Nemmers, 190 F. Supp. 381 (E.D. Wis. 1961).

[37] The rhythmic signs used were the standard mora (or dot), ictus and episema (or vertical and horizontal dashes), and comma. *Id.*, at 384.

[38] This statement could mean that either no such reservation can ever be made, or simply that plaintiff here failed to make one. It probably means the former, since the court could easily have phrased the statement to apply only to this particular case.

[39] 190 F. Supp. at 387–89.

[40] *Id.*, at 387. Some type characters, including large Roman numerals and capital letters found at the beginning of individual chants were stated to have been "specially created for and unique with Desclee". *Id.*, at 385.

This subject matter, said the court, was not so extraordinary that it would fall within the protective scope of unfair competition's "free ride" doctrine.

"The evidence as to the claimed uniqueness and artistic competence of the Solesmes annotations does not suffice to endow this subject matter with such an exceptional character as to give it an additional inherent commercial value, different from that of other literary property of a scientific or artistic nature."[41]

Thus, the court rejected plaintiff's claim of misappropriation,[42] but left open the possibility in future cases of establishing the necessary secondary meaning to layout, composition, and unique type characters and competitive use thereof to constitute actionable misrepresentation.[43] It gave no clear statement on the statutory copyrightability of a type face, type font, or typography, for it was dealing with questions of unfair competition and federal pre-emption.

In the same general vein was the very recent unfair competition case of *Bailey v. Logan Square Typographers, Inc.*[44] a case which involved the jurisdiction of a state court to decide a claim where the defense relied on the federal Copyright Law.

Plaintiff, a photo process printer, designed and compiled over 270 different alphabet styles and reproduced the individual characters on negatives and positives which he licensed to other photo printers. They in turn used the alphabet characters in their published material "without restriction," but the further use of the negatives and positives was regulated by the license agreement. Plaintiff claimed that the unpublished compilation of alphabets had a greater market value than did the published alphabet characters, and thus brought suit against defendant for copying his licensee's negatives.

The Seventh Circuit, in the course of holding that defendant was not entitled to remove to a federal court, made some interesting copyright observations: "The common law has recognized that the owner of unpublished designs or compilations of material has a valuable interest that may be protected from wrongful invasion apart from the federal copyright and patent laws. Indeed, the Copyright Act itself recognizes the validity of common law protection prior to publication. [17 U.S.C. 2] Although that which is published may be freely copied as a matter of federal right, [*Sears, Roebuck & Co. v. Stiffel*, 376 U.S. 225], that which is unpublished and therefore not available for copying, may be protected from misappropriation without offending any federal law.[45] This seems to solidify the doctrine of federal pre-emption as applied to published works.

Another case factually similar to *Desclee* in that it concerned protection for scholarly editing and the addition of (standard shaped) accent and cantillation marks over (public domain) Hebrew characters was *Schulsinger v. Grossman*.[46] Here, the Southern District of New York court granted plaintiffs' motion for an injunction *pendente lite* to protect its copyright against a business competitor's infringement. The Copyright Office had registered plaintiff's work as a compilation, rather than a work of art, and the court seemed to affirm this view of the nature of authorship: "[i]n the light . . . of my finding that defendants have

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[41] *Id.*, at 387.

[42] Though the Sears, Compco and Desclee cases seemed to have closed this door to prospective plaintiffs, it was recently knocked ajar by a California district court in Grove Press v. Collectors Publications, Inc., 264 F. Supp. 603 (C.D. Calif. 1967). There, plaintiff was granted an injunction to prevent defendants from photocopying and offset lithographing the typographic layout of his edition of a public domain book. The Court expressly set aside the Sears and Compco cases and cited for authority Greater Recording Co. v. Stambler, 144 U.S.P.Q. 547 (N.Y. Sup. Ct. 1965); Flamingo Telefilm Sales, Inc. v. United Artists Corp., 141 U.S.P.Q. 461 (N.Y. Sup. Ct. 1964), *rev'd, on other grounds*, 22 A.D. 2d 778, 259 N.Y.S. 2d 36 (1964); and Cable Vision, Inc. v. KUTV, Inc., 355 F. 2d 348, 351 (9th Cir. 1964). Significantly, it also cited I.N.S. [*infra* note 45] for the proposition that: "In view of Plaintiffs' expenditures of substantial sums in setting type and engraving plates, it would constitute unfair competition for Defendants to appropriate the value and benefit of such expenditures to themselves by photographing and reproducing Plaintiffs' book through the offset lithography process, thereby cutting their own costs and obtaining an unfair competitive advantage." 264 F. Supp. 603, 606–607. Whether any court outside of California would recognize protection in these circumstances is questionable.

[43] 190 F. Supp., at 389. The court mentioned E. P. Dutton & Co. v. Cupples, 117 App. Div. 172, 102 N.Y.S. 309 (1907), a case involving the photographic copying of a publication, as authority for the proposition that though the "material was not copyrighted and possibly not copyrightable," unfair competition based on misrepresentation was found where the purpose of copying the book, "including the distinguishing features of the overall makeup and color, was the deception of the public." 190 F. Supp. at 390.

[44] Bailey v. Logan Square Typographers, Inc., 441 F. 2d 47 (7th Cir. 1971).

[45] *Id.*, at 51, citing, *inter alia*, I.N.S. v. Associated Press, 248 U.S. 215, 250–53 (Brandeis, J. dissenting).

[46] Schulsinger v. Grossman, 119 F. Supp. 691 (S.D.N.Y. 1954).

photographed plaintiffs' books instead of paying to have scholars make the corrections by original work, I am forced to the conclusion that defendants have infringed plaintiffs' copyright." [47] The copyright protection afforded here covered editing and scholarly additions, rather than the public domain letters or standard shaped accent marks.[48]

If *Desclee* hinted at, and *Ricordi* stated, that what the Regulation refers to as "ordinary typography" is indeed not copyrightable, these pronouncements are at best *dicta*. Not until *Amplex*, in 1960, did one questioning the statutory copyrightability of a type face, a type font, or typography have a citable judicial reference. Plaintiff in the case sought an injunction to prevent distribution of a business competitor's allegedly infringing sales catalog. Plaintiff's copyrighted work consisted of "pen-and-ink line drawing" illustrations of plexiglass letters and other products sold by both parties. The only lettering involved was of two standard styles: Egyptian standard and Condensed Egyptian; and the court clearly excluded the lettering *per se* from copyright protection: "The plaintiff makes no claim to the right to exclusively use [sic] such lettering and indeed could not, since they are obviously within the public domain." [49]

What the court did protect was plaintiff's illustrations which showed "distinguishable variation in the arrangement and manner of presentation—the dark background, the particular size of the letters, their spacing, their arrangement into three rows. . . ." [50] It is significant, I feel, that the Court nowhere discussed the issue of the copyrightability of typography, *per se*. It merely noted the slight degree of originality necessary to sustain copyright in an illustration, citing, *inter alia*, *Bleistein v. Donaldson Lithographing Co.*[51] "Applying the extremely liberal tests which have been used to determine whether an illustration is capable of copyright, we think it beyond question that both the arrangements of the Egyptian and Modified Egyptian lettering appearing on Pages 18 and 20 of the plaintiff's catalog contain enough originality and creativeness to justify protection under the Copyright Act." [52]

Later, the court remarked that "[i]f it be argued that these drawings contain an extremely small degree of skill and originality, the answer would seem to be that so long as they contain enough skill and originality to justify another's copying them, contrary to copyright notice against such copying, such copying will be enjoined." [53]

In other words, the subject matter protected by the copyright in the court's mind was the advertising layout or arrangement depicted in the illustrations, rather than the lettering; though the court wisely did not speculate whether lettering could, under other circumstances, enjoy statutory copyright protection.

In reaching its decision, the court was obviously influenced strongly by the fact that plaintiff had incurred considerable expense in compiling its advertising catalog, and that defendant, a "substantial competitor," would have enjoyed a considerable commercial advantage had it been permitted to copy the catalog and distribute it to its customers. But the case was decided on grounds of the statute, rather than unfair competition, and such equitable considerations should be submerged in interpreting the case. They are useful only in evaluating the soundness (and precedent value) of the opinion.

In reviewing the *Amplex* opinion, it might also be said that the court's commentary on typographical arrangement (or typography, as we use the term) was not crucial to its conclusion; defendant was found to have copied original illustrations of other products from the same catalog.

"This [plaintiff's copyrightable authorship] is even more evident in the case of the drawings of the several products, which although simple in form, present an original effort at illustration of the particular products. Having gone to the trouble of independently producing these illustrations and thereafter copyrighting them, the plaintiff will be protected against intentional copying by a competitor." [54]

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[47] *Id.*, at 693.
[48] *Cf.* Magnus Organ Corp. v. Magnus, 154 U.S.P.Q. 431 (D.N.J. 1967) (Upholding copyright in a book consisting of numbers and chord buttons superimposed over the musical notes of public domain songs).
[49] 184 F. Supp. at 286–87.
[50] *Id.*, at 288.
[51] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).
[52] 184 F. Supp. at 287 (citations omitted).
[53] *Id.*, at 288 (footnotes omitted).
[54] *Id.*, at 288.

One holding of *Amplex*, then, was that original pictorial prints or engravings of standard lettering can be so arranged and presented in a sales catalog that their illustration is worthy of statutory copyright protection from direct, intentional copying by a business competitor. What weight the Office should accord this holding of the Pennsylvania district court is a focal question for this study.

The case is somewhat puzzling, and its precedent value on the typography point is narrowed because of a decision rendered by the same court two years later. In *Surgical Supply Service, Inc. v. Adler*,[55] the copyrights in price lists registered in Class K were invalidated for want of a minimum degree of artistic or literary merit.

"In the case at bar, there is a mere advertisement consisting of a bare list of articles and prices. The trial judge cannot, under any test of literary or artistic merit, find such advertisement to be the proper subject of a valid copyright. It clearly lacks the legal minimum or originality necessary for a copyright.

"The catalogues or other advertisements held to be copyrightable had some originality or quasi-artistic character." [56]

The decision also read prior law as requiring that a work "be connected with the fine arts" to be copyrightable.[57] This suggests that the Amplex catalog's copyrightability might have rested more on the product illustrations than the opinion patently indicated. Or perhaps the court was simply more sympathetic toward the copyright claims of one who illustrated his public domain letters against a shaded background in three rows, exercising some creativity in his manner of presentation, as opposed to one who listed articles and prices in a standard practice manner, exhibiting little creativity.

If the *Amplex* opinion seems to have been dictated in large part by the law of the market place, the same might be said of that rendered by the Southern District of New York court in the 1968 case of *Pantone,.Inc. v. A.I. Friedman, Inc.*[58] Like *Amplex*, this case involved plaintiff's attempts to uphold his statutory copyright in the face of an alleged infringement by a business competitor. Plaintiff here was an artists' supplies dealer who prepared and assembled an advertising booklet containing an allegedly original color matching system. Each of the seventy-two pages in the booklet bore a series of bands of selected colors, arranged to provide a range of selections derived by using eight basic colors and black and transparent white.

"Plaintiff's selection of the eight basic colors and of blends of these colors to provide a range of acceptable color values, presented in attractive gradations moving from one basic hue and its variations into another, was the product of a great deal of effort which required careful consideration of numerous artistic factors including the aesthetic attributes of each shade and its use in the commercial art field." [59]

The court granted a motion for a preliminary injunction to restrain defendant from copying and vending a like booklet. It cited, *inter alia*, the *Amplex* case as authority for holding that "plaintiff's mode of expression, combination and arrangement of colors in its booklet" possessed "sufficient originality and uniqueness" to qualify the work for copyright. "Although the mere portrayal of a series of gradations of color shades, standing alone, would present a doubtful case for copyright protection, the arrangement here possessed the already described unique quality which apparently gained ready recognition on the part of artists in a critical profession." [60] Thus, the colors themselves were not copyrightable (indeed, defendant's colors were not exact copies of plaintiff's) ; but their arrangement and presentation in an advertising booklet were protected against copying by a business competitor, particularly where defendant distributed with his copy a cross-reference sheet designed to create the false impression that plaintiff's and defendant's color matching systems were interchangeable. The court seemed to be recognizing copyright protection for an original arrangement and presentation of standard material.

In sum, the few, and generally low-level, court opinions relevant to our study have affirmed, in *dicta*, the non-copyright-ability of "ordinary typography" without defining the term. At the same time, at least one court has been willing under the aegis of the Copyright Law, to protect the original illustration and presentation of public domain lettering in trade catalogs against direct copying by a

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[55] Surgical Supply Service, Inc. v. Adler, 206 F. Supp. 564 (E.D. Pa. 1962).
[56] *Id.*, at 569.
[57] *Ibid.*
[58] Pantone, Inc. v. A. I. Friedman, Inc., 294 F. Supp. 545 (S.D.N.Y. 1968).
[59] *Id.*, at 547
[60] *Id*, at 548.

business competitor. Although the authority for this opinion is perhaps weak, the decision in turn became (non-binding) precedent for an analogous one offering statutory copyright protection for an arrangement of standard colors in an advertising booklet. The scope of the two decisions has not been tested further by the courts; and in the absence of definite judicial resolutions of the problems raised by this study, it might be useful to examine trends in the law and Office practice concerning copyrightability of works of art in general.

C. Copyrightability of Works of Art Generally

One of the greatest mysteries of federal copyright law is the meaning of the constitutional term "writings" of an author,[61] the works in which copyright protection may be secured.[62] Congressional enacting legislation has been almost as vague as the Constitution, and the present law says only that "[t]he works for which copyright may be secured under this title shall include all the writings of an author." [63]

Though it enumerates classes of material subject to copyright, the Law does not set particular standards for deciding when a work falls within a class. The legislative vagueness may be a boon for those who have been forced to apply a sixty year old law to modern productions and moods, for it affords the possibility of flexibility in administering the law. At the same time, it means that persons faced with administering the law should consider how far a legislative agency like the Copyright Office should advance on its own in expanding the substantive scope of the law, absent legislative or judicial command.

It is extremely important that Office policy regarding registrability of a particular type of work be sound, for its practice is the only route open to most applicants. True, a prospective copyright applicant may have ultimate recourse to the courts, but not until he has first either exhausted his administrative remedies and waded through the time-consuming, expensive mandamus procedure or been called into court as a defendant in an infringement suit.[64] Even if he perseveres to this extent, he might face the burden of disproving the validity of Office actions to the court. So, the Office should not be too quick to deny registration to any given class of material.

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[61] U.S. Const. art. I § 8.

[62] Walter Derenberg, in a study preparatory to the proposed revision of the present Copyright Law, presented an interesting discourse on the alternative interpretations of constitutional "writings." Since it may be useful, from a philosophical point of view, to bear these in mind, they are summarized here.

". . . [T]he legislative history of the copyright acts does not provide an express answer. What rationale can be gleaned from the reports and the acts that will explain the present development of congressional copyright protection?

"The first theory to present itself is that the copyright clause was intended to protect literal 'writings,' meaning such objects as books and periodicals—words written in a form intelligible to all who can read. This is the most obvious and the most easily disposed of limitation on the scope of copyright insofar as legislative history is concerned. Not only is there no recognition of this construction in the congressional reports, but, as will be shown later, from the first enactment in 1790 to the most recent codification 1947, the acts themselves exceed this narrow definition.

"Two other theories, however, are more probable and do find support in the legislative history. It can fairly be maintained that the copyright clause reflects a desire to protect the commercial value of the productive effort of the individual mind. From this evolves the plausible conclusion that the clause was intended to protect all intellectual property capable of extensive reproduction, and that whenever new methods of reproduction made possible the 'pirating' of unprotected works resulting from intellectual effort, the clause could be expanded. (note 45: In line with this reasoning, it might be argued that the founders, in using the word 'writings,' used it as the one word that would encompass all the items that needed protection, and intended that it would expand along with technical progress. If the Constitution is a living instrument, it is logical to presume that its component parts must also 'live'.)

"A third conclusion as to the scope of the clause involves the proposition that the first part of the clause—'To promote the Progress of Science and useful Arts'—defines and colors the entire clause, and that whatever may be construed as promoting science and the useful arts falls within the definition of 'writings.'

"The latter two theories achieve the same result—a broad scope of coverage. The evidence to support either of them, although more implied than express, is convincing. As will be seen by an examination of all the pertinent copyright acts, either of these theories or a combination of them could be the proper meaning of the copyright clause so far as copyright legislation and proposed legislation is concerned."

[W. Derenberg, "The Meaning of 'Writings' in the Copyright Clause of the Constitution." In *Studies On Copyright* (Arthur Fisher Memorial ed.), Vol. 1, Study No. 3 at 71–72 (1963).]

[63] Copyright Law of the United States, 17 U.S.C. § 4 (1964).

[64] 17 U.S.C. § 13 (1964); Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co., Inc., 155 F. Supp. 932 (S.D.N.Y. 1957), *aff'd.*, 260 F. 2d 636 (2d Cir. 1958); Comment, "The Role of the Register of Copyrights in the Registration Process: A Critical Appraisal of Certain Exclusionary Regulations," 116 U. Pa. L. Rev. 1380 (1968).

At the same time, by being unduly lax in granting registration, the Office would shift an equally onerous burden on the would-be users of the type of work. Either a person must refrain from using such a work, or he must assume the unhappy risk of successfully asserting the invalidity of the registration in his defense in an infringement suit. This may well be a difficult task, for courts accord *prima facie* validity to the certificates of registration issued by the Office;[65] and experience has shown that they frequently rely on Office expertise and the actions which presumably result therefrom.[66]

Hence, the Office step should be sure, if not slow. A review of trends in court opinions and Office practices concerning registrability of works of art generally will help us to determine whether an Office step toward registration of an individual type face, type font, and/or typography would fall on solid ground.

1. The law

Miss Schrader, during her term as head of the Office's Arts Examining Section, prepared a memorandum surveying reported court cases on copyrightability from *Bailie v. Fisher*[67] through October of 1968, with particular emphasis on works of art.[68] That review began by setting forth the quantitative standard of originality enunciated by Justice Holmes in upholding the copyrightability of circus poster advertisements in *Bleistein v. Donaldson Lithographing Co.*[69]

"A picture is nonetheless a picture and nonetheless a subject of copyright that it is used for an advertisement. . . .

"It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations outside of the narrowest and most obvious limits." [70]

It continues, quoting from *Bell v. Catalda*:[71]

" 'Originality means that the work owes its origin to the author; all that is needed is that the author contributed something more than a merely trivial variation, something recognizably his own; originality means little more than a prohibition of actual copying; it is enough if it be his own.' It is very instructive however to examine the work which is the subject of the case. With few exceptions, the work contains considerable original authorship in the *guarantitative* sense, and it is a quantitative rather than a qualitative standard which the Copyright Office attempts to apply. We are not art critics." [72]

The memo examined the particular works involved in cases during the aforementioned period, and cited pertinent court language on standards of copyrightable authorship for works of art. A review of these comments indicates that courts for the most part determine the registrability of works on a case-by-case basis, and that they generally affirm the Holmes view that originality is a quantitative standard which requires that the author add something of his own, something which has not been copied.

This study reviews cases decided from the memo to date and refers to opinions spanning both periods in commenting upon judicial attitudes and opinions relevant to our topic. Special emphasis has been placed on cases not covered in Miss Schrader's memo. Cases discussed elsewhere in the paper are, for the most part, omitted here.

The opinions reviewed indicate that while courts differ in their approaches to problems of copyrightability, they are of a mind in requiring that a work exhibit some originality and/or creativity in order to be statutorily copyrightable. And, the trend seems to be to require a small quantity of authorship, particularly where plaintiff seeks to uphold his copyright against a business competitor.[73]

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[65] 17 U.S.C. § 209 (1964), provides that certificates of registration shall be admitted by any court as "prima facie evidence of the facts stated therein."

[66] Comment, *supra* note 64 at 1385–6, note 32.

[67] Bailie v. Fisher, 258 F. 2d 425 (D.C. Cir. 1958).

[68] Memo from D. Schrader to file on "Survey of Copyrightability Cases Decided Since Bailie v. Fisher," October 1968 (unpublished collection of Schrader memos found in Copyright Office Library). No additional research has been done on cases covered in this memo.

[69] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

[70] *Id.*, at 251, cited in Schrader, *supra* note 68, at 2.

[71] Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc., 86 F. Supp. 399 (S.D.N.Y. 1949), modified, 191 F. 2d 99 (2d Cir. 1951).

[72] Schrader, *supra* note 68, at 3–4

[73] *See, e.g.*, language to this effect in Day-Brite Lighting, Inc. v. Sta-Brite Fluorescent Mfg. Co., 308 F. 2d 377 (5th Cir. 1962), discussed in Schrader, *supra* note 68 at 22–23; National Chemsearch Corp. v. Easton Chemical Co., 160 U.S.P.Q. 537 (S.D.N.Y. 1969).

In several cases, the arrangements of public domain items, in the view of the court, involved enough originality and/or creativity, to warrant sustaining the copyright. Thus, the Fifth Circuit court of Appeals in *Tennessee Fabricating Co. v. Moultrie Manufacturing Co.*,[74] reversed the district court and held to be copyrightable as a work of art an architectural metal casting print "formed entirely of intercepting straight lines and arc lines." In reaching this decision, the court cited with approval Sec. 202.10 (b) of the Copyright Office Regulations, as well as our Circular 32, and concluded that plaintiff's architectural unit possessed at least "the minimal degree of creativity" required for copyright.

Similarly, plaintiff's device for teaching the fingering of chords on a guitar was protected from copyright infringement in *Trebonik v. Grossman Music Corporation*,[75] on grounds that it "arranges and presents chords in an original, creative, and even novel way." The court emphasized that "no one prior to the plaintiff ever attempted to present a categorized system of available guitar chords in a quick reference system such as a wheel" and "none of the earlier works, however, undertook to depict such a large number of chords or to present any comprehensive system of classifying any substantial number of available chords."

Gelles-Widmer Co. v. Milton Bradley Co.,[76] contained language upholding copyright in an arrangement of "basic materials and arithmetical problems [which] "may have been old and in the public domain," because "the arrangement, the plan, and the manner in which they were put together by the author, does constitute originality." [77]

In *Peter Pan Fabrics, Inc. v. Dan River Mills*,[78] the Southern District of New York upheld copyright in a pattern based on a public domain daisy pattern. The court said the "juxtaposition and arrangement of the flowers" constituted sufficient originality to support a copyright claim. In so deciding, it noted that the design as purchased had to be embellished and expanded before it could be engraved on the rollers. This slight addition, though a very modest grade of originality, was nonetheless sufficient.

Finally, *Millworth Converting Corp. v. Slifka Fabrics*,[79] contains lower court *dicta*, affirmed on appeal, to the effect that:

"The copyright law does not require that there be originality [in this context, apparently meaning novelty] in artistic arrangements. If it did it would be impossible to get a copyright on different 'versions' of the same work.

"In the present case the print displays sufficient originality to warrant a copyright. The fact that the artistic arrangement of the print is derived from the artistic arrangement of the embroidery on a fabric does not prevent it from being subject to copyright." [80]

At the same time, courts say there must indeed be a quantity (more than "a minimum") of original authorship to sustain a copyright; a work must exhibit a 'distinguishable variation' from pre-existing works.[81] And cases were found during this period that denied copyrightability for want of sufficient amounts of creative authorship. In *Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*,[82] for example, the court denied plaintiff's motion for a preliminary injunction on grounds that his imitation flowers lacked even a "faint trace" of originality. The court recognized that "the accidental or contrived creation, if it qualifies objectively, is doubtless enough" to sustain the requirements of originality. But it said that: "[d]efendants make an impressive showing, thus far unanswered, that the kind of plastic flower in question, with face, with or without a pot, and with the few other accoutrements this one displays, are all old familiar elements of the trades in which both parties are engaged." [83]

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[74] Tennessee Fabricating Co. v. Moultrie Manufacturing Co., 164 U.S.P.Q. 481 (5th Cir. 1970), *cert. denied*, 398 U.S. 928 (1970).

[75] Trebonik v. Grossman Music Corp., 163 U.S.P.Q. 352 (N.D. Ohio 1969).

[76] Gelles-Weidmer Co. v. Milton Bradley Co., 313 F. 2d 143 (7th Cir. 1963).

[77] *Ibid.*, cited in Schrader, *supra* note 68, at 29.

[78] Peter Pan Fabrics, Inc. v. Dan River Mills, 161 U.S.P.Q. 119 (S.D.N.Y. 1969).

[79] Millworth Converting Corp. v. Slifka Fabrics, 124 US.P.Q. 413 (S.D.N.Y.), 276 F. 2d 443 (2d Cir. 1960).

[80] 124 U.S.P.Q. at 414, cited in Schrader, *supra* note 68, at 18. *Contra*, Gardenia Flowers. Inc. v. Joseph Markovits, Inc., 280 F. Supp. 776 (S.D.N.Y. 1968) (denying copyright protection, for want of creativity, in plaintiff's arrangement of artificial flowers).

[81] Millworth Converting Corp. v. Slifka Fabrics, 124 U.S.P.Q. 413 (S.D.N.Y.), 276 F. 2d 443 (2d Cir. 1960); *cf.* United Merchants and Manufacturers, Inc. v. K. Gimble Accessories, Inc., 294 F. Supp. 151 (S.D.N.Y. 1968).

[82] Florabelle Flowers, Inc. v. Joseph Markovits, Inc., 160 U.S.P.Q. 611 (S.D.N.Y. 1968).

[83] *Id.*, at 614.

Thus it found plaintiff's work uncopyrightable for being no more than "the aggregation of well-known components to comprise an unoriginal whole." [84]

Similarly, in *Concord Fabrics v. Marcus Brothers Textile Corp.*,[85] the same District Court found defendant's use of a similar design, consisting of a small square within the basic handkerchief and a circular design therein, did not constitute infringement. It was "at worst" the appropriation of an unprotectable idea, said the court. And *Gordon v. Warner Brothers Pictures*,[86] in *dictum* affirmed the non-copyrightability of the title "F.B.I. Story;" *O'Hara v. Gardner Advertising, Inc.*,[87] held plaintiff could have no copyright in the phrase "Have A Happy," even when used for advertising purposes; and *H. M. Kolbe Co. v. Armgus Textile Co.*,[88] contained dicta to the effect that ". . . a checkerboard configuration . . . does not possess even the modest originality that the copyright laws require." [89] These cases echo the sentiments expressed by the Southern District of New York Court in the frequently cited opinion of *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*,[90] holding uncopyrightable the arrangement of plaintiffs plastic flowers. Announcing that both originality and creativity are prerequisites to statutory copyright in a work of art, the New York Court said: "Here there is no doubt that the corsages were completely lacking in creativity and originality. The arrangements of components in these corsages are no different from the arrangement of components in artificial and natural corsages which had been common and traditional in the trade for many years before plaintiff's were produced. . . ." [91]

In another vein, courts have found several non-art works uncopyrightable where they consisted of listings or compilations of public domain elements, on grounds of their lack of originality. Thus the Fifth Circuit in 1970 denied the validity of plaintiff's copyrighted "Agreement" or business form in *Donald v. Zack Meyer's T.V. Sales and Service.*[92] In holding that the work lacked the minimum originality for statutory copyright protection, the court relied on the "sweat of his own brow" test of *Amsterdam v. Triangle Publications, Inc.*:[93] ". . . like the map in *Amsterdam*, Donald's form is nothing more than a mosaic of the existing forms, with no original piece added. The Copyright Act was not designed to protect such negligible efforts. We reward creativity and originality with a copyright but we do not accord copyright protection to a mere copycat." [94]

These decisions are reminiscent of the earlier Circuit Court opinion in *Morrissey v. Procter and Gamble.*[95] There, in the course of denying statutory copyright for a set of contest rules expressed in simple declaratory statements totaling about 100 words, the court said: ". . . When the uncopyrightable subject matter is very narrow, so that the 'topic necessarily requires,' [cites omitted] if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance. In such circumstances it does not seem accurate to say that any particular form of expression comes from the subject matter. However, it is necessary to say that the subject matter would be appropriated by permitting the copyrighting of its expression." [96]

To this writer, these opinions do not suggest copyright protection for any new classes of material akin to type fonts. They do, however, show a judicial willingness to recognize the copyrightability of original arrangements of substantial

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[84] *Ibid.*

[85] Concord Fabrics v. Marcus Brothers Textile Corp., 161 U.S.P.Q. 31 (S.D.N.Y.), 409 F. 2d 1315 (2d Cir. 1969).

[86] Gordon v. Warner Brothers Pictures, 161 U.S.P.Q. 315 (Cal. Dist. Ct. 1969).

[87] O'Hara v. Gardner Advertising, Inc., 300 N.Y.S. 2d 441 (N.Y.S. Ct. 1969).

[88] H. M. Kolbe Co. v. Armgus Textile Co., 315 F. 2d 70 (2d Cir. 1963).

[89] *Id.*, at 72.

[90] Gardenia Flowers, Inc. v. Joseph Markovits, Inc., 280 F. Supp. 776 (S.D.N.Y. 1968).

[91] *Id.*, at 783, cited in Schrader, *supra* note 68, at 6.

[92] Donald v. Zack Meyer's T.V. Sales and Service, 165 U.S.P.Q. 751 (5th Cir. 1970).

[93] Amsterdam v. Triangle Publications, Inc., 89 U.S.P.Q. 468 (3d Cir. 1951).

[94] 165 U.S.P.Q. 751, at 754; *cf.* Consumer Union of United States, Inc. v. Hobart Mfg. Co., 199 F. Supp. 860 (S.D.NY 1961) *But see* Pittway Corp. v. Reliable Alarms Mfg. Corp., 164 U.S.P.Q. 379 (E.D.N.Y. 1969), where the copyrightability of certain price lists was found to be an issue of fact which cannot be disposed of on summary judgment, indicating that they might be protectible. The eight-page net price lists in question listed certain alarm systems and components, with columns indicating the catalog number, item description, unit price, quantity price and catalog page number of each.

[95] Morrissey v. Procter & Gamble Co., 379 F. 2d 675 (1st Cir. 1967).

[96] *Id.*, at 678, cited in Schrader, *supra* note 68, at 24. *But see* Norton Printing Co. v. Augustana Hospital, 155 U.S.P.Q. 133 (N.D. Ill. 1967) (copyright in hospital forms upheld on grounds that they may convey information, as well as recording it); Cash Dividend Check Corp. v. Davis, 247 F. 2d 458 (9th Cir. 1957).

amounts of public domain elements, where the materials lend themselves to a variety of combinations or methods of presentation, and where the arrangement in question is recognizably different from those standard to the trade.

2. Office regulations [97]

A brief history of pertinent Office Regulations may be useful in examining the interpretation of present Regulations and evaluating their soundness, particularly in the absence of clear legislative or judicial guidelines with respect to the copyrightability of the three species of typography. Two issues arise in this context: (1) how much originality and/or creativity is required for a work to be registrable as a work of art; and (2) are these standards affected if the work in question has a utilitarian function, and if so, how?

Of course, the applicability of the comments on utility will depend upon a particular reader's assessment of whether a type face, type font, or typography are "utilitarian objects" for copyright purposes. If one equates utilitarian objects with functional ones and views type characters as instruments or devices [98] for communicating written language, then they are utilitarian objects when they are grouped in word-forming or information-forming combinations and must meet the corresponding tests of copyrightability. But information-grouped characters are unique in that their function lies in their appearance; and, if one defines "utilitarian" as an object which conveys something more than its appearance, then type characters are not utilitarian and need not meet those standards to be registrable as works of art.

Office Regulations Before 1956

Beginning with the Regulations of 1890, copyright in works of art, followed the statutory prescription and was specifically restricted to works of fine arts.[99] The 1890 Regulation stated: "The fine arts, for copyright purposes, including only painting and sculpture, and articles of mere ornamental and decorative art are referred to the Patent Office, as subjects for Design Patents." [100]

The reason behind the rule was apparently to exclude commercial art works and works of utilitarian value. Thus, the Directions for Securing Copyright published in March of 1899 provided: ". . . no article can be registered in the Copyright Office which cannot be classed under one or the other designation used in the law to indicate the articles subject to copyright protection. * * * The words 'engraving', 'cut', and 'print' are understood to mean only a work of art, and the articles which they designate are subject to copyright only when they are articles sold or exchanged for their artistic value." [101]

The exclusion of utilitarian articles from copyright registration was more clearly enunciated in the Directions of 1899, containing the first listing of articles not subject to copyright. Although neither type face nor typography was specifically mentioned, articles subject to patents for designs were, and continued to be, included in a similar list in every Regulation published from 1899 to 1905.

In 1910, the format of the Regulations changed in response to the newly enacted Copyright Law of 1909. The Regulations now listed the works subject to copyright, including, *inter alia*, works of art (embracing only "works belonging to the so-called fine arts") and "prints and illustrations." The latter "comprise[d] all printed pictures not included in the various other classes enumerated above," and the Regulation continued: "[a]rticles of utilitarian purpose do not become capable of copyright registration because they consist in part of pictures which in themselves are copyrightable. . . . Mere ornamental scrolls, combinations of lines and colors, decorative borders, and similar designs, or *ornamental letters or*

[97] The material presented in this section is mainly gleaned from a memo I prepared earlier this year for Register Kaminstein, and one prepared by the Head of the Arts Section in 1968. No further original research was done on the material covered in these memos. Memo from H. Oler to A. Kaminstein on "Provisions on Type Face or Typography in the pre-1956 Regulations of the Copyright Office," Feb. 8, 1971 (unpublished collection of Oler memos in the Copyright Office Library); memo from D. Schrader to files on "Survey of the Practices of the Copyright Office Re: Registration of 'Works of Art,'" Nov. 1968 (unpublished collection of Schrader memos in the Copyright Office Library).

[98] *See* M. Nimmer, *Copyrights*, Sec. 37.6 (1970).

[99] Statutory copyright was first specifically granted to works of fine arts by the Copyright Act of 1870. M. Schrader, *supra* note 97, at 2.

[100] Regulations of 1890, compiled, in Compilation of Regulations Concerning Copyright 1974–1956, at 4 (mimeo found in Copyright Office Library).

[101] Regulations of 1890, compiled, in Compilation of Regulations Concerning Copyright 1874–1956, at 14 (mimeo found in Copyright Office Library).

forms of type are not included in the designation 'prints and pictorial illustrations.' Trademarks cannot be copyrighted nor registered in the Copyright Office." [102]

That provision was reproduced verbatim in the second printed set of 1910 Regulations,[103] but was changed in 1913. Although the 1913 Regulations still excluded "Productions of the industrial arts utilitarian in purpose and character," [104] the literal exclusion of ornamental letters or forms of type was not present.

"Productions of the industrial arts utilitarian in purpose and character [were] not subject to copyright registration, even if artistically made or ornamented" from 1914 until 1917, when this provision was reformulated to read: "The protection of productions of the industrial arts utilitarian in purpose and character even if artistically made or ornamented depends upon action under the patent law; but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture." [105]

This Regulation seemed to reflect [then] Register Solberg's view that a line should be drawn between copyright and design patent. For example, in a letter which typified his view, he stated: "It seems clear that in the case of any work of such a character that the protection which is desired is that provided for under the design patents Act cannot obtain that protection by any action taken under the provisions of the copyright law." [106]

The 1917 provision remained until it was reworded in 1946, to the same effect.

During the period of 1910 to 1937, Office practice manifested Solberg's view and refused registration to *published* works within the purview of design patent.[107] The practice apparently did not preclude the registration of artistic drawings of designs which might later be embodied in a utilitarian article,[108] nor, in rare cases, of articles of manufacture "where the purely artistic element either predominate[d] over the utilitarian element or [was] practically separable from it. . . ." [109] But registrations in the former category were made with the warning that "such registration secured protection against copying of the drawing itself but presumably did not protect the design as embodied in an article of manufacture." [110]

Office practice during the term of Register Bouvé (1937–1944) became more restrictive concerning registration of artistic works which might have a utilitarian function. If a work served a useful purpose, "no amount of artistry—no matter how 'artistic' the thing may be—[could] change its purpose and make a work of art out of a utensil." [111] Drawings for utilitarian objects were registrable only in Class I; G registrations were refused, as was the description of the work as "design for work of art." [112] The philosophy behind this rule was expounded in a letter drafted by DeWolf for Bouvé's signature: ". . . It would be a serious matter for the Copyright Office to take administrative action which would cut the ground from under the feet of the many proponents of design copyright, including Members of Congress and the Patent Bar." [113]

Further, ". . . An object of utility may in one sense justify the appellation of a work of art, but merely because a thing may be artistic or because an artist or any group of artists may consider it a work of art, if its purpose is utilitarian rather than ornamental or esthetic it has not been and will not be considered the subject of copyright registration in this Office." [114]

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[102] Regulations of 1910, compiled, in Compilation of Regulations Concerning Copyright 1974–1956 (mimeo found in Copyright Office Library) (emphasis added).

[103] *Ibid.*

[104] Regulations of 1913, compiled in Compilation of Regulations Concerning Copyright 1874–1956 (mimeo found in Copyright Office Library).

[105] Regulations of 1917, compiled in Compilation of Regulations Concerning Copyright 1874–1956 (mimeo found in Copyright Office Library).

[106] Letter from Register Solberg dated July 6, 1914, quoted in Schrader, *supra* note 97, at 6.

[107] Schrader, *supra* note 97, at 4 *et seq.*

[108] Schrader, *supra* note 97, at 11.

[109] Letter from R. DeWolf, Acting Assistant Register of Copyrights, dated May 6, 1931, quoted in Schrader, *supra* note 97, at 14.

[110] Schrader, *supra* note 97, at 12.

[111] Memo from Register Bouvé to the Staff dated July 24, 1937, cited in Schrader, *supra* note 97, at 24.

[112] Schrader, *supra* note 97, at 24.

[113] Letter from Register Bouvé, dated December 23, 1937, cited in Schrader, *supra* note 97, at 25–6.

[114] Letter from Register Bouvé, dated September 4, 1940, cited in Schrader, *supra* note 97, at 26.

The big change in Office policy with regards to works of art came with Register Warner's issuance of the 1948 Regulations, Section 202.8 of which included, as copyrightable works of art, works of "artistic craftsmanship": "Section 202.8 Works of art (Class G) (a) In general, "This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture. Works of art and models or designs for works of art are registered in Class G on Form G, except published three-dimensional works of art which require Form GG." [115]

Preparatory to the formulation of this new Regulation, Mr. Kaminstein, then Chief of the Examining Division, studied Office practice and court cases concerning works of art and recommended that the Regulations be changed to permit registration of works of "artistic craftsmanship" in so far as their form but not their utilitarian aspects were concerned. His conclusions on the role of the Office with regard to the registrability of these new types of materials may be significant for our study:

"Although the [court] decisions are not always well reasoned, they show a willingness to accept administrative practice in determining copyrightability and also indicate a somewhat more liberal position than that taken by the Office. The text writers are definitely critical of the present rule on works of art.

"* * *.

"It is my general feeling that the test of registrability ought be whether the work is a work of art, irrespective of whatever else it may be. Although I am aware of the difficulties involved in setting ourselves up as judges on this point, a task we do not particularly relish, I suggest that, with respect to any of the established art media, we require the very minimum of artistry, but that in any new category we attempt to apply a general 'low-grade' criteria. We will not sit in judgment on what purports to be a painting, but we will require an ash tray to be made artistically and we will require even more of dishes. We may accept something comparable to Cellini's masterpiece but not the ordinary run of salt cellars . . . *the further we go from established art forms, the greater the necessity for the artistic element in the individual work*." [116]

On the basis of the new Regulation, the Office departed from previous practice and agreed to consider registration for works of "artistic craftsmanship" such as jewelry, in so far as their form but not their utilitarian aspects were concerned.[117] At the same time, registration was discouraged for primarily utilitarian works and works which fell "within the industrial arts," principally on grounds that there was "great likelihood that design patent protection would be more nearly in order." [118]

The Supreme Court opinion in 1954 put an end to the idea that copyright protection ceased once a work of art was embodied in a utilitarian article. It also expressed approval of the 1948 Regulation and its expansion of the work of art category. Thereafter, the Office agreed to register textile designs, though Register Fisher commented he would not further expand the classes of registrable art works.[119]

In 1954, a new set of Office Practices was issued. It contained Miss Ringer's formulation of the "intrinsic nature of the item" and the "separable work of

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[115] Regulations of 1948, compiled in Compilation of Regulations Concerning Copyright 1874–1956 (mimeo found in Copyright Office Library).

[116] Memo from A. Kaminstein, Chief of Examining Division, on registration for works of art, dated April 11, 1948, cited in Schrader, *supra* note 97, at 31–2 (emphasis added). The implied qualitative standard for non-established forms of art did not survive the issuance of new Regulations in 1956. In fact, such artistic judgments are expressly rejected in a memo from A. Goldman, General Counsel, to Register Fisher on "Present Examining Practices Re: Works of Art" dated September 14, 1959. Following this memo and those initiated by Miss Ringer prior to drafting the new Regulations, the Office arguably followed a quantitative standard of the authorship necessary to support a registration for all works of art, though the amount might increase if the item had a utilitarian aspect.

[117] The Regulation did not expressly include textile designs, and the Office declined to register them until after the Supreme Court decision in Mazer v. Stein, 347 U.S. 201 (1954) (granting copyright protection to a statuette lamp base on grounds that it contained separable artistic authorship).

[118] Memo from Mr. Cary to Register Fisher dated April 10, 1951, cited in Schrader, *supra* note 97, at 32.

[119] Schrader, *supra* note 97, at 36.

art" concepts which have determined the registrability of works of art with utilitarian aspects since 1954. Miss Schrader's survey concluded that the latter has prevented further extension of copyright into the industrial design field and has spawned a quantitative standard of the authorship necessary for registration of a work in Class G. It does not preclude registration for a work if it possesses separable artistic qualities;[120] but if ". . . the shape of an article, is dictated by, or is necessarily responsive to, the requirements of its utilitarian function, its shape, though unique and attractive, cannot qualify it as a work of art.

"Examples:

"(1) Machinery such as generators or lathes.

"(2) Tools such as saws or hammers.

"(3) Instruments, such as hypodermic needles, scalpels, calipers, or hair clippers."[121]

These concepts were embodied in the Office Regulations published in 1956 and 1959, both of which prohibit, for want of sufficient original authorship, registration for "mere variations of typographic ornamentation, lettering for coloring . . ."[122]

Copyright Office Regulation (1956)

Works of Art (Class G)

(a) General: This class includes published or unpublished works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as works belonging to the fine arts, such as paintings, drawings, and sculpture.

(b) In order to be acceptable as a work of art, the work must embody some creative authorship in its delineation or form. The registrability of a work of art is not affected by the intention of the author as to the use of the work, the number of copies reproduced, or the fact that it appears on a textile material or textile product. The potential availability of protection under the design patent law will not affect the registrability of a work of art, but a copyright claim in a patented design or in the drawings or photographs in a patent application will not be registered after the patent has been issued.

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[120] The validity of the separability text was recently affirmed by its recent application in the case of Ted Arnold. Ltd. v. Silvercraft Co., Inc., 259 F. Supp. 733 (S.D.N.Y. 1966). In considering the copyrightability of a pencil sharpener fashioned to simulate an antique telephone, the court said: "The telephone casing could be separate physically from the pencil sharpener. . . . An antique telephone is no more necessary to encase a pencil sharpener than a statuette is to support a lamp. . . . The telephone casing satisfies this requirement [of creative authorship]. It is not a copy of any real telephone. It is a composite creation, the result of library research and sketches of different types of early telephones. It is irrelevant that early telephones were strictly utilitarian. Plaintiff's version was not designed for the same use. 259 F. Supp. 733, 735."

[121] Part IV of the Copyright Office Practices of October 1954, reproduced verbatim in Schrader, *supra* note 97.

[122] Copyright Office Regulations, 37 C.F.R. 202.1 (a) (1956) (1959). The Second Circuit approved of the copyrightability standards contained in Regulation 202.1 (a) in *dicta* appearing in its opinion in Kitchens of Sara Lee, Inc. v. Nifty Foods Corp., 266 F. 2d 541 (2d Cir. 1959). In upholding the copyright in photographs of products on commercial prints and labels, it said: "Not every commercial label is copyrightable; it must contain 'an appreciable amount of original text or pictorial material'. . . . The Copyright Office does not regard as sufficient to warrant copyright registration 'familiar symbols or designs, mere variations of typographic ornamentation, lettering or coloring, and mere listing of ingredients or contents.' Although the publication of these views does not have the force of statutes, it is a fair summary of the law. 266 F. 2d 541, 544."

That the Office publicly reaffirmed its position with regards to typography as recently as 1965 is demonstrated by statements contained in the published Reports of the Register of Copyrights on Copyright Law Revision. In the July 1961 Report, the following statement of policy appeared at page 11: ". . . we do not think that the language of the statute should be so broad as to include some things—typography, broadcast emissions, and industrial designs are possible examples—that might conceivably be considered the 'writings of an author' but are not intended by Congress to be protected under the Copyright Law. U.S. Government Printing Office, *Report of the Register of Copyrights on Copyright Law Revision* 11 (1961)."

And the Register's later Supplementary Report contained the following: ". . . there are particular kinds of subject matter on the fringes of copyright which may be the 'writings of an author' in the constitutional sense and which Congress might one day want to protect, but which it does not see fit to protect now. Typography, certain industrial designs, and broadcast emissions are possible examples of this today."

(Both of these quotations appeared in a memo from Mark Lillis to Abraham Kaminstein on "Copyright Protection of Designs for Type Face", February 9, 1971, (unpublished inter-Office memo).

(c) When the shape of an article is dictated by, or is necessarily responsive to, the requirements of its utilitarian function, its shape, though unique and attractive, cannot qualify it as a work of art. If the sole intrinsic function of an article is its utility, the fact that it is unique and attractively shaped will not qualify it as a work of art. However, where the object is clearly a work of art in itself, the fact it is also a useful article will not preclude its registration.[123]

Copyright Office Regulation (1959)

Works of Art (Class G).

(a) General: This class includes published or unpublished works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as works belonging to the fine arts, such as paintings, drawings, and sculpture.

(b) In order to be acceptable as a work of art, the work must embody some creative authorship in its delineation or form. The registrability of a work of art is not affected by the intention of the author as to the use of the work, the number of copies reproduced, or the fact that it appears on a textile material or textile product. The potential availability of protection under the design patent law will not affect the registrability of a work of art, but a copyright claim in a patented design or in the drawings or photographs in a patent application will not be registered after the patent has been issued.

(c) If the sole intrinsic function of an article is its utility, the fact that the article is unique and attractively shaped will not qualify it as a work of art. However, if the shape of a utilitarian article incorporates features, such as artistic sculpture, carving, or pictorial representation, which can be identified separately and are capable of existing independently as a work of art, such features will be eligible for registration.[124]

It is submitted that this review of Office practice shows that the "utilitarian" considerations of statutory copyright protection should apply to a type face, to a type font, and to typography when presented in information-conveying combinations; and that these works should not be excluded on the basis of a definition embracing only objects which convey something other than their appearance. The Office practices were designed to establish registration criteria for objects which are both useful and attractive, and their rationale applies equally well to objects whose use is their appearance.

With regard to utilitarian objects, the review of Office practices suggests several persistent patterns. First, for many years the Office has shown readiness to register technical drawings or blueprints, even if the object depicted is a utilitarian one. Second, there have been fluctuating requirements as to the amounts of original artistic authorship necessary to support registration. Such changes are effected within the Office, even in the absence of legislative or judicial directives. Finally, there has been a gradually increasing Office recognition of dovetailing between copyright and design patent domains, but a faltering hesitancy to enter the realm of industrial designs, and a persistent refusal to register as works of art objects whose shapes are determined primarily by their utilitarian function.

D. Administrative conclusions

If "typography" is considered to embrace a type face, or individual letter, a type font, or assortment of type characters in one style, and typography, or the arrangement and position of type on a printed page, these elements may be analyzed individually to suggest an Office policy on their registrability.

The analysis for each involves first a decision as to whether the work is utilitarian in the copyright sense. If it has no such aspect, its registrability may be judged by the usual standards as to whether it possesses a sufficient quantity of original artistic authorship.

If it does have a utilitarian aspect, different quantitative standards apply. Courts have never enunciated satisfactory criteria for determining the registrability of a useful but attractive work. Generally, in considering utilitarian objects, the Office follows the policy set forth in Nimmer's treatise on copyright: "The basic question then is whether the object can be considered a work of art ap-

[123] 37 C.F.R. § 202.10, effective August 11, 1956.
[124] 37 C.F.R. § 202.10, effective June 18, 1959.

plying the historical and ordinary standards. Where the question is close the answer may turn on whether the shape or form of the object (as distinguished from its intended use) is dictated primarily by aesthetic or utilitarian considerations. If it is the former then the resulting work may be considered capable of constituting a work of art and hence a work of artistic craftsmanship notwithstanding a collateral utilitarian function." [125]

In either case, the analysis involves a description of the nature of typical authorship for each kind of "typography," a review of legal and administrative precedent, and a suggested Office practice with corresponding consequences.

1. A type face

Registration for the single type character is not the primary concern of today's applicants. They seek protection for entire fonts or new styles of type, possibly because they recognize that the alleged originality in most new commercial type characters is not readily apparent when the characters are viewed individually. Aside from the ornate type character, which has long been registrable if it contains sufficient original authorship to constitute a work of art, each new letter typically bears a strong resemblance to extant characters. Hence, even apart from characters' utilitarian aspects, they probably do not contain sufficient authorship to be registered as works of art. But individual characters are arguably utilitarian objects in that they are devices by which information is communicated. As such, a character would be registrable under Office standards as a work of art only if it contained more than a minimum amount of original and separable artistic authorship, and if its shape were not dictated primarily by its function.[126] This category does not embrace the "ordinary" new commercial type characters whose copyrightability is the focus of this paper.

This absence of substantial quantities of original authorship in individual type characters designed for commercial printing use stems from the designer's salient goal: to create a readable font. It seems that most research in type designing is concerned with legibility. "Legibility research in printing is concerned with the efficiency of the visible word. So, too, is the practice of typographical design." [127] Within the narrow confines of width and height (set size and point size) dictated by standard printing machines, type designers aim to create more readable fonts. Each letter must blend with the others, so that the overall appearance of a font may be appealing; but the aesthetic appeal of an individual character or indeed of an entire font is clearly secondary to its readability.[128]

Although designers aver that each new character is different from those already in existence,[129] the changes are quantitatively very small, typically involving a slightly different location for the widest and narrowest points of a particular letter, which changes the overall shape or appearance of the letter. The height and width of letters for commercial fonts are practically dictated by the Anglo-American Point System, standard set sizes, and extant printing machines. Within very narrow confines, a designer may vary the character, subject to his judgment of its legibility and salability.

Usually, in addition to the dimension and scale restrictions, the new letter's shape is limited in that it must be simple enough to be used on high speed presses, easily readable, adaptable to other characters in the font, and sufficiently similar to existing models to appear familiar to the reader.[130] The differences between standard sized individual letters in an old and new newspaper type font, for example, are barely perceptible to the untrained eye, though industry spokesman claim they are easily identified by those in the trade.[131]

Probably, even in the unlikely event that a type designer created new nonornamental characters for use in the publication of limited editions on a hand set printing machine, such letters would be only slightly different from exist-

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[125] M. Nimmer, *Copyrights* Sec. 19.3 (1970).

[126] See Copyright Office Regulation 1956, *infra* p. 37.

[127] H. Spencer, *The Visible Word* 6 (1968). The meeting on Janary 27, 1971, confirmed this practice with respect to the Company's type design aims.

[128] Interestingly, one source asserts that some commercial letters are "beautiful and right" and possess an aesthetic quality independent of their function. Scottish National Gallery of Modern Art, *The Art of The Letter* (1970). Even if this were true, it would not be determinative of the question of registrability, for that is determined by quantities of authorship rather than by quality or aesthetic appeal.

[129] Meeting August 19, 1970.

[130] These points were emphasized at both meetings; *see generally* H. Spencer, *The Visible Word* (1968).

[131] Meeting January 27, 1971.

ing ones, since each was designed above all to be legible.[132] Though the letter may deviate from standard dimensions, its size alone could not qualify it as sufficiently original, since statutory protection would cover its reproduction in any size.

No instance has been found either in the courts or in the Office where the copyrightability of an individual character of the sort discussed here was proffered. The cases which spoke of typography, such as *Ricordi*, *Shulsinger*, and *Amplex*, did not concern original individual characters in the sense here considered. Rather, they involved standard alphabets and punctuation marks whose protection was not at issue. The claims there were found on allegedly original arrangements or presentations of standard elements, viz., the typographical appearance of the printed page. While *Desclee* admittedly involved a work some of whose type characters were allegedly original, (though probably not ornamental in the *Dutton* sense), the court's opinion didn't discuss the question of protecting them by copyright, since plaintiff expressly waived reliance on his statutory copyrights.

Clearly, if a standard sized type face, without other embellishments, scroll work, or intricate design, were submitted, Office practice to date would demand refusing its registration as a work of art. Apart from any utilitarian considerations, such a letter would lack the requisite amount of copyrightable authorship to support registration. Both Judge Hand's *dicta* in *Ricordi* and M. Nimmer's treatise on Copyright admit of the non-protectability of some types of "ordinary typography" as works of art. If these statements are accorded any validity they must point to the unavailability of statutory protection for an individual commercial type character of the non-ornamental variety.

From an administrative point of view, it would be unwise to buck judicial and scholarly opinion, industry assumption and long-standing Office practice to reverse Office policy on the registration of such works. Too, a claim for such an individual type character would be extremely difficult to examine. Without comparing it with prior art (which the Office as a matter of course does not do), the average examiner would be unable to determine whether a given work contained substantial amounts of original, copyrightable authorship.

Finally, because the image of a type face is almost inextricably entwined with the letter it represents, and because individual letters are arguably utilitarian objects, the courts rather than the Office should interpret the Copyright Law to determine whether its work of art protection extends to individual type characters.

Courts are available to proprietors of such claims. The Office might well agree to register technical drawings for original letters, even of the non-ornamental variety, in Class I, provided the application indicates that the claim covers only the "drawing" and not the design. This would involve little additional work for the typical claimant, since such drawings usually would be prepared anyway as prototypes for the matrices.[133]

The registration would give the claimant easy entrance to court in the case of an infringement, and he would thus enjoy a judicial pronouncement on the existence and extent of copyright protection for his work. A Class I registration (as opposed to a Class G) would not necessarily prejudice his rights, since courts hold that registration classification is irrelevant to determining the extent of benefits accorded a particular work.[134] At the same time, a user would not suffer from a presumptive validity burden in an infringement suit unless he copied the actual blueprint drawings. Thus the Office would not be lending its imprimatur to the broader protection generally accorded a work of art.

I recommend making Class I registrations for technical drawings of individual characters because such drawings clearly contain original authorship and their registration would in no way reverse prior precedent, policy or practice; at the same time, this practice would open an avenue to the courts, where the question of the appropriate extent of copyright protection for such works should be decided.

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[132] *See* the "Profile" on Giovanni Mardersteig appearing in the July, 1970 issue of the "New Yorker" magazine. This printer has created a few fonts for use on his hand-set machine, but the article describes his method of printing as a dying breed and says his principal efforts were directed toward the resurrection of Renaissance type faces. Moreover, there is no evidence that his designs vary in any readily recognizable way from established fonts.

[133] *Supra* note 12.

[134] *See, e.g.*, the enduring controversy over whether registration for architectural blueprints protects against copying the finished architectural structure.

2. A type font

A type font consists of all the characters in a particular style of type. It is the alleged authorship involved in the creation of admittedly new commercial type fonts which *Y* now, and *X* before it, seeks to protect by statutory copyright.

Registration of claims in type fonts, as contrasted with other kinds of typography, is at once the most important from an industry point of view and the most troublesome from a copyright point of view. Its importance rests in the fact of the ease and frequency of competitive copying of new designs within the industry. The trouble stems from the fact that granting statutory copyright protection would fly in the face of traditional standards as to requisite amounts of copyrightable authorship for works of art, and from the fact that statutory protection might practically restrict the public's free use of public domain information when printed in a protected font. It should be emphasized that these comments on statutory protection for new commercial fonts of the *X* and *Y* variety in no way preclude registration for individual characters or for fonts which could be registered under traditional Office standards on the basis of their extensive original artistic authorship. If a character's shape is determined primarily by aesthetic considerations rather than legibility ones, and if it possesses a substantial quantity of separable artistic authorship, then it may be considered for registration even though it functions as a letter, numeral, or other communicative device. Such a work would usually be an ornate introductory character or collection of them. It would not be a font for high speed printing of the body of text of a newspaper or unlimited edition book. It would not be a font which appeared to the lay observer to duplicate other extant commercial fonts.

Commercial type designers contend that an original font possesses an "overall aesthetic quality" stemming from the appeal of the interrelationship of all the letters, shapes, and figures which comprise a particular font.[135] This quality, they say, transcends the particular order of the letters (such as their presentation in standard sequence, A through Z) and persists when the individual characters are scrambled or rearranged to form new sequential combinations. The fact that a font contains all the components for conveying information renders it a utilitarian object in an even stronger sense than that in which a single character may be considered utilitarian. This fact, coupled with the fact that the design of a commercial font is principally determined by considerations of legibility, renders the typical font unregistrable as a work of art. As with individual characters, it is conceivable that a font could be designed primarily for artistic rather than functional purposes, and that it could contain such quantities of separable artistic authorship that it would be registrable under traditional Office standards for works of art. Ordinary new commercial type fonts would not fall under this aegis.

This formula is in line with present Office practice and court pronouncement. If the courts have not addressed themselves to the possibility of statutory protection for individual letters, neither have they considered the broader question of copyright for a conglomerate of those of a particular style, in the form of a type font. Scholarly opinion, for the most part, is equally silent. Nimmer makes a general statement recognizing that "ordinary typography" is not copyrightable because it is based on the alphabet and thus lacks the requisite originality; but he decries the Regulation's proscription for "mere variations of typographic ornamentation, lettering or coloring," citing *Amplex* and *Shulsinger*. Judging from his citations, Nimmer's statement probably refers to what this paper calls typography, rather than to type fonts. Otherwise, the statement must be dismissed as unsupported, for neither cited case involved original type characters.

Absent any judicial authority in point, one recent writer assumed the copyrightability of original type fonts in the following perplexing statement: "It is true that decisions of the courts of the United States on every level seem to be uniform in the opinion that 'a distinguishable variation in the arrangement and manner of presentation by reason of dark background, particular size of letters used, their spacing and arrangement gives the product independent authorship worthy of protection against copying . . . and plaintiff is entitled to an injunction restraining a competitor from copying such illustrations (typography)' [Citing *Amplex*]. I do not believe, moreover, that anyone will seriously argue against the copyrightability of revised material in the public domain, or against

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[135] Meeting, August 19, 1970.

the protection accorded illustrative originality of type fonts or illumination." [136] Protection for type fonts is not this author's primary concern. He seeks copyright protection for typography *per se*, rather than for type characters or fonts. Moreover, his observation on the copyrightability of type fonts is made without authority against a background where the weight of past practice and present policy point to opposite conclusions.

From a practical point of view, similar considerations to those warranting the continued refusal of Class G registration for individual characters pertain here. In the form in which the fonts are usually most widely distributed, a typical examiner would have great difficulty recognizing the presence of substantial original authorship. The authorship obstacle would be even greater if the font is conceded to be a utilitarian object. Then, since it is an object whose form is dictated by its function (legibility), and one which lacks substantial separable artistic authorship, it clearly is incapable of supporting a copyright registration. To change our standards on this point would be to do likewise with respect to all utilitarian articles with artistic shapes.

A more theoretical drawback to offering registration for a type font is that the collective work for which protection is sought has no permanent, fixed form. Prospective applicants seek protection for the font in whichever form the component characters appear. Since copying is possible even from inked proofs, protection to be effective would have to extend beyond the matrix or grid stage to the innumerable variety of forms in which the font is finally embodied on the printed page.

Perhaps the salient argument against copyright protection for a commercial type font is that it might create a corresponding restriction of free use of the underlying reading material that courts have long sought to avoid.[137] Non-protectible underlying material might be kept from the public for a potential fifty-six year period unless the user was both aware that the copyright notice protected only the font and unless he was willing to transcribe the entire body of material into an unprotected type style.

Should a proper case ever reach a court, it might conceivably avoid such a result by creating an implied-in-law license, but would the Office want to foster such a possibility with its concomitant restriction of the traditional bundle of rights implied in a statutory copyright? [138]

On balance, it seems that the regrettable plight of the commercial type font designer should not be alleviated by Copyright Office agreement to register his fonts as works of art. Particularly if we agree to consider registration for technical designs of the individual characters, the door to the courts is open to the designers; and it is the function of the courts, not the Office, to balance the considerable equities at stake here.

3. Typography

Finally, we must consider the advisability of modifying Office practice to consider registration for specific typography or the arrangement and presentation of type characters (whether or not the characters themselves are new) on the printed page. This is one issue on which courts have provided some direction. They have set boundaries beyond which no protection is possible unless precedent is ignored. Thus, aside from the extreme *Grove Press* opinion,[139] and *dicta* in the *Bailey* case,[140] the only unfair competition protection available is that founded on misrepresentation, providing secondary meaning can be established.[141] *Ricordi* may leave open the possibility of common law protection surviving publication if the work contains a specfic reservation of rights in typography, but at least one authority attacks the validity of this position.[142]

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[136] F. Jehle, "Typographic Copyright, Public Domain and Unfair Competition," 1 Scholarly Publishing 255 at 256 (April, 1970) (emphasis added). The copy gives no indication of the author's profession or legal training, if any.

[137] *See, e.g.*, Judge Hand's opinion in the Ricordi case discussed *supra* at p. 10; *See generally* P. Goldstein, "Copyright and the First Amendment," 70 Columbia R. Rev. 983 (1970).

[138] Registration for ornamental characters would not involve a comparable restriction since such fonts would not be used extensively for high speed commercial printing.

[139] *Supra* note 42.

[140] *Supra* note 44.

[141] 190 F. Supp. 381, 389–91 (2d Cir. 1952). The availability of the INS kind of misappropriation protection has been negated by the Desclee and Ricordi cases. 190 F. Supp. 381, 388; 194 F. 2d 914, 916.

[142] M. Nimmer, *Copyrights* Sec. 33 (1970).

From the point of view of possible statutory protection we find that though mere pagination is not protectible for want of originality,[143] at least one court has indicated that the typographic arrangement and presentation of public domain letters may be protectible.[144] Another court, by analogy, has said the same thing with regards to the presentation of colors.[145]

Thus, it seems likely that the Office should change its practice in response to these cases and consider registration for some apparently original presentations of type characters, so long as the claim clearly extends only to the arrangement and not to the underlying material and so long as the arrangement represents more than a minimum quantity of original authorship. This is the narrowest possible reading of *Amplex* and would practically preclude registration for almost everything other than that type of advertising presentation where no content is conveyed and where the arrangement is not a standard one.

In most cases where context is conveyed by word or number groups of type, it could be argued that the layout is functional if it seems designed to aid legibility rather than to appeal to the aesthetic senses. In this event, the layout would be registrable only if it were clearly not standard and contained a quantity of original copyrightable authorship. For example, if the words of the Declaration of Independence were presented in such a format that they appeared on the page as a portrait of Thomas Jefferson, the work could be considered for registration as a work of art provided the application contained a statement limiting the claim to the original arrangement. The registration would not include the information content of the Declaration (i.e., the verbal expression) or the style of type in which it was printed.[146] The vast majority of applications (if any) based on typography (in the narrow sense of the term) would be rejected for want of sufficient original copyrightable authorship.

This policy follows recent judicial dictates without contradicting the Office's earlier Strauss study on copyright protection for type fonts and typographic arrangement. At the same time, it is admittedly open to criticism for inconsistency. If obviously standard objects can be copyrightably arranged, why can't public domain text also be registrable?[147] The only retort would be that when type characters are not presented in word-forming combinations or other information-conveying manners, they are not utilitarian and need not possess a quantity of separable artistic authorship in order to be registrable under present Office standards. This formula would reflect the Office's policy against restricting the public use of what might be public domain information or expression by registering a copyright in the type in which that information is printed.[148] It does not offer as broad copyright protection as that sought by Professor Nimmer: ". . . [o]ne who reproduces a public domain work in original typography should be able to obtain a copyright upon such a derivative work so as to preclude others from photographing the pages of the work even though such copyright will not preclude a copying of the words as distinguished from the typography."[149]

But in view of Nimmer's analysis of the case law as saying that "once a work has entered the public domain no common law copyright or statutory copyright protection may be claimed for the typography as such, so that the work may thereafter be photographically copied,"[150] it seems the only practical Office practice. Where the risks to the public users would be so high in restricting the material by granting registration, the Office should not undertake the burden of determining whether the underlying information is public domain and when

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[143] Eggers v. Sun Sales Corporation, 263 Fed. 373 (2d Cir. 1960).

[144] 184 F. Supp. 285 (E.D. Pa. 1960).

[145] 294 F. Supp. 545 (S.D.N.Y. 1968).

[146] An analogous case, presenting text from the Bible as a portrait of Jesus, arose in the Arts Section within the past three years. It could not be located at the time of this writing.

[147] Jehle, for example, argues for across the board copyright protection for the "skill and awareness" involved in "the selection, setting, arranging, and presentation of type styles to enhance the printed work." Jehle, *supra* note 136 at 255. He admits that he is without "legal basis" in seeking such protection. *Id.*, 256.

[148] Without addressing himself to the possible restricted information ramifications, Jehle suggests that protection for the publisher's typography be obtained by statutory recognition of ". . . the existence of a 'work product,' apart from the expression of ideas by the author, which will be protected after the content itself (expression by the author) falls into the public domain. *Id.*, at 258."

Jehle continues: "Inclusion of recognition in a statute relating specifically to unfair competition in the reproduction of another's typography, or a recognition that the copyright of the 'typography' can survive the relinquishment of the copyright covering the author's expression, may be the only salvation for the original publisher in the face of pirating made possible by new technology."

Ibid.

[149] Nimmer *supra* note 98, at 33.

[150] *Ibid.* (footnotes omitted).

it became so. Unless the courts at a later date command such an investigation, the Office should not volunteer it.

4. The regulations [151]

If this standard is adopted as Office practice, the reference to "typographic ornamentaton" might be deleted from Regulation 202.1(a), leaving the prohibition against "mere variations of lettering or coloring; mere listing of ingredients or contents. . . ." That term is confusing in that "typography" usually refers to the arrangement or appearance of type on a printed page. As used here, it seems to refer to the ornamentation of a single letter, yet it has been interpreted by the Office, and presumably by the public as well, to embrace a type face, type font and typography. Since the proposed practice cannot be succinctly expressed in the context of this Regulation, since the prohibitions outlined in it are not intended to be exhaustive, and since the proposed practice would not deviate from our general standards for works of art and utilitarian objects, the deletion need not be replaced by a new statement. Moreover, since the term "typographic ornamentation" is ambiguous, its deletion should not mislead the public to any conclusions with respect to the registrability of a type face, a type font or typography.

In the alternative, since the General Counsel believes the Regulation should make some mention of the noncopyrightability of typography as authority for Office rejections of claims, the Regulations might be revised in accord with a newly drafted set of Office practices.

IV. CONCLUSION

Ordinarily commercial printing type designs of the *Y* and *X* variety have never been and are not now registrable under judicial and Office standards of copyrightability as works of art. They are primarily utilitarian objects or devices for conveying information, and in the typical commercial design the shape of the individual character and of the entire font is determined by its legibility function.

The Office might offer registration for technical drawings of the characters or fonts in Class I, with an indication on the application that the claim extends only to the drawing. Such registrations would be in line with our practice for other utilitarian works and would at least give the applicant an entry to court where he could test the validity of his claim to broader protection.

This formula does not preclude registration as a work of art for a type design which is so ornamental that it possesses a quantity of separable artistic authorship capable of supporting a copyright registration. Such a design would differ recognizably from "ordinary" commercial designs, and its shape would evidently not be determined by its function of legibility. It would probably be too intricate to be practically useful on high speed presses used for mass production of printed material.

Typography or layout design is likewise incapable of supporting a registration unless it possesses a sufficient quantity of original artistic authorship. Hence, if the layout portrays informaton-conveying printed text, it would be considered only in the unusual event that it contained more than a minimum quantity of separable authorship. A layout whose outline constituted a recognizable picture might be such a case. If the layout contains no information-conveying groups of symbols, it need only be recognizably original and not standard to support a copyright registration. For any registration made in this category, the corresponding application should clearly indicate that the claim extends only to the original arrangement of public domain elements.

I suggest that the above practice be outlined in an Office I.D., and that the current Regulation's reference to "typographic ornamentation" be deleted from Section 202.1(a) or be revised in accordance with a newly drafted Office practice.

EXHIBIT E

THE AMERICAN INSTITUTE OF GRAPHIC ARTS,
New York, February 7, 1975.

NOTE TO THE EDITORS

Enclosed is a Statement of Position of the American Institute of Graphic Arts concerning typeface design protection. This issue, as you know, is currently

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[151] At a meeting on August 30, 1972, to review this paper, General Counsel Goldman expressed the opinion that some mention of the noncopyrightability of the material under discussion should be included in the Regulations as authority for Office rejections. He suggested that the Regulation in question be reviewed following the drafting of new Office practices.

under active consideration in the Copyright Office. The Copyright Office has held hearings on proposed changes in typeface copyright regulations.

On January 7 the AIGA sponsored an open forum to air the various viewpoints. There was active audience participation by AIGA members and guests. This Statement of Position is an outgrowth of that meeting. It has been sent to Ms. Barbara Ringer, Register of Copyrights, and is for immediate release.

att: AIGA Statement of Position regarding copyright of typefaces.

THE AMERICAN INSTITUTE OF GRAPHIC ARTS,
New York, February 3, 1975.

STATEMENT OF POSITION—TYPE FACE DESIGN PROTECTION—THE AMERICAN INSTITUTE OF GRAPHIC ARTS, BY KARL FINK, PRESIDENT

The American Institute of Graphic Arts numbers among its 1700 members both typeface designers and typographic consumers—graphic designers and graphics production people who design with and specify typography. In the current controversy over type design protection, the Institute has two concerns:

1. To exercise its influence and offer help to seek a solution which will, insofar as possible, serve the needs of the graphic arts professions.

2. To help create a climate in which type designers can work both creatively and with adequate recompense and in which graphic designers can be free to select type faces on the basis of appropriateness and aesthetic considerations without fear of legal entanglement.

AIGA is composed largely of creative people working in graphic communication, publishing, advertising, promotion, signage and other manifestations of visible language—a broad representation of the users of typography.

To us, type is a vital part of the communications process. It is a means of creative expression. In our opinion, the outcome of current discussions will be an important factor in determining the future visual quality of American communication. It will most assuredly influence the future of typographic design in this country. It can help create conditions that nurture and support creativity or conditions that stifle creative thinking, experiment and innovation.

Most of us in AIGA know a great deal about type and its uses and little about legislation and its enforcement. Accordingly, in stating our views on the matter of type design protection, we will stick to our own area of expertise. We will state our needs, express our opinions on what is best in the way of a climate for producing good work, voice our concerns, points to pitfalls, and mention moves we believe would be detrimental. We make no recommendations as to what legislation or other governmental action will best achieve our goals.

However, we will, if asked, supply information and advice to legislators and Copyright Office personnel, will work with them in developing a system that satisfies the needs of graphic designers; we will lend our support to rulings or legislation which is consistent with those needs.

A typeface is a unique creative work which merits government protection against unauthorized copying. It is as deserving of such protection as a novel, a poem, a song or a drawing. After examining the options, we think that it can fall within the purview of amended Copyright Office regulations. But we prefer to state conditions and let others decide how best to do it:

1. We would like to see universal licensing of typefaces to all legitimate manufacturers. We consider it healthy to have type faces obtainable from more than one source, provided there is good quality control. Because type face designs are unique, they must be meticulously and accurately reproduced. Their extension to matrixes or grids for equipment other than that for which they were originally designed is to be carefully controlled by the original designer or design team. Only with this kind of quality control, which insures compatibility, can designers specify type with the assurance that their finished designs will reflect their graphic plans.

2. Because type faces are designed—and selected—by name, AIGA feels that any copyright or design protection system must cover both design and name. AIGA welcomes licensing of type designs among a number of marketers. However, for the protection of users of type, we believe that the name for a type face must be recognizable and that the configuration of the type to which the name is assigned must be constant. Name and design should not be separable.

3. We are told that a possible effect of a change in copyright office regulations—albeit a remote one—might be that an injunction could be obtained against printing of a book because the type in which it is set is of questionable origin—an

unauthorized copy of a protected face. The author, publisher and printer would thereby become victims and suffer financial loss in a dispute between marketers of type fonts. We also understand that specific legislation could preclude such a circumstance.

Should typefaces become copyrightable, we feel there exists a temporary solution to this problem: book manufacturers could simply limit their designers and printers to use of type faces in the public domain—all faces that were standard prior to a change in regulations—until any danger of disruption of production schedules is eliminated by legislation.

4. AIGA wants to be certain that the costs of type composition remain reasonable—that a royalty and licensing system will not inflate rates unfairly; it also wants to be sure that any royalty or license charge will be collected only once, when the font or grid is sold. Moreover, we would oppose any change which placed restrictions for use of composed letters on the graphic designer, who must be free to alter or adapt as special graphic needs dictate.

5. There are obvious problems in determining whether a specific type face is, in fact, sufficiently original to merit granting of a copyright or in determining whether a type face is sufficiently like another to constitute an infringement of copyright. The differences which distinguish one type face from another are often subtle or minute; they might well seem insignificant to the layman. Yet these differences often prompt a designer to specify one face and reject another that seems almost the same.

To overcome this difficulty, and to minimize the amount of litigation that will inevitably result from copyrighting of type faces, AIGA recommends formation of an advisory group of typeface experts—specialists who understand the significance, or lack of significance, of differences in letter forms. This typographic panel could have several functions:

a. To serve as an advisory group to the U.S. Copyright Office and to legislators in promulgating effective typographic design protection laws and regulations.

b. To help establish criteria of originality (not aesthetic value) by when copyrightability or protectability of type faces can be determined on a regular basis.

c. To clarify, mediate or arbitrate disputes involving typeface designs. To serve as experts in mediation, arbitration or litigation.

We believe that an effective system of type design protection will foster more and better type design in this country. Arguments to the contrary seem to stem from fear and from the automatic tendency of business to resist assignment of additional powers to government bureaus. While the process of protection will require study and periodic refinement, we believe it will turn some fine American designers toward a challenging area in which they have not been able to afford to work of recent years. This will almost automatically follow when type designers are paid for their effort in proportion to the success of their product.

Now on Mergenthaler photocomp equipment Auriga, a new letterform.

THIS IS BACK COVER OF
"ART DIRECTION" ISSUE
OF MARCH, 1974 PUBLISHED
BY ADVERTISING TRADE PUBLICATIONS,
INC., 19 W. 44 ST., NEW YORK,
N.Y. 10036

Matthew Carter has devised a new roman letterform based on gothic structure and logic: Auriga. The large and simple forms normal to sanserifs bring a deliberate simplicity and spaciousness to the traditional roman. The figure-ground relationship of these large shapes and small block serifs provides visually interesting letterforms in display. It unites the wordshapes in text. Auriga's structural innovation provides sound legibility by simplifying detail. *Less is more. Auriga is truly a state-of-the-art typeface, the latest typeface on Mergenthaler's latest photocomposition system.*

COQU$& ceos IJ !ilj? HMNU hmnu
BRDGP rft 142 TFEL agdpqu VWXY kz
AKZ967 S3580 ‘’ vwxy .,;:

COQU$& ceos IJ !ilj? HMNU hmnu
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COQU$& ceos IJ !ilj? HMNU hmnu
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For a comprehensive specimen of the Auriga family of typefaces contact St[illegible] Byers, Typographic Development Div. Mergenthaler Linotype Co, P. O. Box 82, Plainview, New York 11803; or telephone, area code 516, 694-1300, extension 385.

Mergenthaler
Eltra

EXHIBIT F

Souvenir Series

[illegible] Point 6 A [illegible] a

256 MENDER

Straighten

[illegible] Point 7 A [illegible] a

210 BRIGHTER

Neckerchief

24 Point 9 A 17 a

166 REBUILDING

Machine Shop

18 Point 13 A 25 a

GUIDES REGAIN

Distinguished Men

14 Point 18 A 34 a

SHREWD INVESTOR

County Disbursements

12 Point 21 A 40 a

9 IMPROVES FURNISHING

Inspect College Auditorium

10 Point 23 A 46 a

7½ HANDSOME SHIP DESIGNS

Foreign Manufacturers Pleased

[illegible] Point 26 A 52 a

6 REQUIRE BUSINESS TECHNIQUE

Superintendent Prevented Deficiency

[illegible] Point 29 A 58 a

[illegible] GOLDEN SUNSET HOURS

[illegible] Delight Outdoor Enthusiast

Characters in Complete Font

A B C D E F G H I J
K L M N O P Q R S
T U V W X Y Z & $
1 2 3 4 5 6 7 8 9 0
a b c d e f g h i j k l m n
o p q r s t u v w x y z
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MUSIC

Gebring-Smithe
now commands
attention from the
most conservative
as well as the more
fastidious lover of
music. The shelves
are piled high. Miss
Mayson entertains

Your selections
played

GEBRING-SMITHE

BLOOMINGTON

VERSATILE ORNAMENT

EXHIBIT G

abcdefghijklmnopqrstuvwxyz
ABCDEFGHIJKLMNOPQRSTUVWXYZ1234567890

Excellence in typography is the result of nothing more than
an attitude. Its appeal comes from the understanding used in
its planning; the designer must care. In contemporary advert
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Exibit H

AMSTER & ROTHSTEIN,
COUNSELORS AT LAW,
New York, N.Y., July 18, 1975.

Hon. ROBERT W. KASTENMEIER,
Room 2232,
Rayburn House Office Building,
Washington, D.C.

DEAR MR. KASTENMEIER: I want to thank you and the other members of the Committee for the opportunity to present our views on the typeface issue during the hearings conducted on July 17, 1975.

At the end of my testimony, you inquired whether Mr. Irwin Karp of the Authors League of America and Mr. Alan Latman, in their testimony at the November 6, 1974 hearings before the Copyright Office, merely expressed opposition to change of the Copyright Office Regulations, or whether they also spoke against creation of exclusive rights in typeface designs under the Copyright Laws generally.

I have reviewed the transcript of their testimony and enclose a copy for your use. It seems clear to me that both Mr. Karp and Mr. Latman opposed the creation of exclusive rights in typefaces under the Copyright Laws, whether effectuated by regulation or legislative action. From their statements, this would include Title I of H.R. 2223.

Specifically, Mr. Karp stated at page 83 of the enclosed text:

"The League believes that type designs and fonts for the printing of books and magazines do not, and by their nature cannot, meet the requirements of copyrightability. The extension of protection to these tools of book publishing would be self defeating, creating unacceptable risks in the use of any variations from the countless presently available designs which are in the public domain."

Mr. Latman stated, at page 99 of the enclosed text:

"My clients share my view that creative designing deserves its reward, and that very often federal statutory protection is necessary to achieve that reward. At the same time, my clients and I believe that copyright is not the proper vehicle for protection of type face designs, and that the established practice of the Copyright Office is well-founded."

I do not believe that Mr. Karp addressed himself to the inclusion of typeface designs under potential design legislation (such as Title II of H.R. 2223). I read Mr. Latman's comments as suggesting that Title II would be the appropriate place to consider this issue.

Again, I cannot purport to speak for Mr. Karp or Mr. Latman, and urge that you read their own statements.

I am taking the liberty of forwarding a copy of this letter to the other members of the Committee and counsel in the hope that this clarifies the point which you raised.

Very truly yours,

DANIEL EBENSTEIN.

EXCERPTS FROM NOVEMBER 6, 1974, COPYRIGHT OFFICE HEARINGS

Mr. SOLO. Yes, you are right when you say I am pushing design patents. I feel that they have not been explored to the fullest.

Ms. RINGER. My final question is, have you looked at the design legislation that was evolved several years ago and is now hooked onto the Copyright Revision Bill?

Mr. SOLO. Yes, but it's only hooked onto the bill, it doesn't exist. And who knows when the bill is going to be passed. Yes, that design legislation I find very interesting, and probably is the answer. But all of these same points about examination and classification and the availability of public search and so on, still apply, I think, to the design bill. I mean, there would be the same problems.

Ms. RINGER. I think that's probably true.

Mr. SOLO. So I suppose that really is the thrust of my argument, and I would push for design patent protection.

Ms. RINGER. Thank you. The next witness is Irwin Karp of the Authors League of America. We will go on until 1:00. We're about a half hour behind our schedule, but perhaps we'll want to go on.

Mr. KARP. Miss Ringer, my name is Irwin Karp and I am counsel for the Authors League of America, which is a national society of professional writers and dramatists. The Authors League opposes the proposed amendment to the Reg-

ulations governing the resignation of type faces, fonts, and typography as promulgated in your notice of proposed rule making. The League urges the Copyright Office to retain present Regulations and your interpretation of them, which have been in effect (the Regulations) for at least 18 years, and reflect the practice of even longer standing.

The Regulation prohibits the registration of mere variations in typographic ornamentation, lettering and coloring, and as the Regulation has been interpreted by the Copyright Office, it prohibits the registration of faces and fonts generally, and certainly those used for ordinary publishing of books and journals. At the outset may I note that I can't apologize as my distinguished colleague Mr. Wasserstrom did for repetition because I have the horrible feeling that repetition is one of the few forensic tools left for us in this area.

Here we have a very sound study completed by the Copyright Office only two years ago, after all the relevant cases were decided, which concluded with, I think, unanswerable logic that the Regulations are correct and at best subject to only modest modification. We have a whole file of studies prior to that made by Mr. Strauss and other distinguished scholars, and yet you've got us back at the board here. What else can we do but repeat, is a question which I find difficult to answer. And I learn that now you're having the author of the last memorandum rewrite it and take the other side, which is an exercise in logic and perhaps in legal training—but I'm not sure it is sound administrative practice.

In any event, we submit that the registration should not be allowed for, (and I repeat this only for the purpose of making the distinctions which Ms. Oler made, and which you pointed out again, Barbara) type face in the sense of design of an individual letter, type font, the assortment of types of one size or style, or for the typography in the sense of arrangement on the printed page. The League believes that type designs and fonts for the printing of books and magazines do not, and by their nature cannot, meet the requirements for copyrightability. The extension of protection to these tools of book publishing would be self defeating, creating unacceptable risks in the use of any variations from the countless presently available designs which are in the public domain.

We also believe that if any change ultimately ought to be made in the status of publishing typography—font and face—it should certainly not be done by the inflexible method of change in your registration regulations. Neither you or the regulations have the capacity to cope with multitudinous problems that would be created, some of which were so plainly and effectively illustrated by Mr. Solo just a moment ago.

You are not a legislator. You can only say yes or no. Register or not register. And you can't mediate or modify the impact of that absolute judgment on many industries and the whole process of disseminating information and culture in this country.

Why do we contend that typography, especially publishing typography is not copyrightable? First, the studies made for the Copyright Office, to which I referred, concluded that ordinary type face and fonts are not copyrightable material under the present copyright law. We think these conclusions are correct. There are no authoritative decisions holding otherwise. As Mr. Strauss noted, the primary function of publishing type face is to present the text of a book or article in a readable form. The design of letters in any font used for publishing does not have an aesthetic function or independent standing as a work of art separate from that primary function of conveying the author's work, his sentences and paragraphs, his ideas and expressions.

Indeed as Mr. Strauss and Ms. Oler note, type that has sufficient decorative value to stand separately as works of art probably could not be legible enough for use in books intended to be read, nor as Ms. Oler has pointed out, could they probably be produced by modern methods. Encyclopaedia Britannica put it this way: "Typography is the art of printing. It has as its first object not ornament but utility. The printer must never distract, even with beauty, the reader from his text. In the printing of books there is less room for individuality of style than in the typography of propaganda." I assume by propaganda the Britannica probably meant advertising.

I might also note, since we're prone to talk about cases, that a functional analysis is not something strange to the Supreme Court of the United States. The Supreme Court recently made a functional analysis in the case of *United Artists v. Teleprompter*. I would daresay that were your Regulations changed and challenged, as they undoubtedly would be, and we ended up in the Supreme Court,

I wouldn't be surprised to find the court citing the *United Artists* case and asking you what you thought you were doing in the first place.

Publishing type designs are not independent works of art, not those created for publishing books, or articles in journals, or any other printed material. They are not created for the purpose of existing as works of art, and they are not "consumed" as such by their audiences. Nobody buys a textbook because it is printed in Bodoni rather than Baskerville. Nobody buys Heller's latest novel rather than Mary McCarthy's because one is set in Caledonia and the other in Cheltenham. If a reader wants Robert Lowell's latest book of verse, they will buy it regardless of which of the innumerable clear and beautiful variations on public domain designs are used in its composition. That is the functional analysis which Mr. Solo, I think, was trying to make for you.

The Mergenthaler Company and other proponents of registration are not seeking to protect type designs which are created to hang on museum walls. They are not trying to prevent other people from reproducing copies to hang on other museum walls. What they seek is a new power, not heretofore granted by the courts or the Regulations, to prevent others from printing books with the 26 letters of the alphabet, in a particular variation they claim to have "created". What is probably really at stake here is an effort by one group of powerful competitors to foreclose competition in the providing of printing services and production by its competitors.

The design of publishing type faces does not involve the authorship or originality required by the Copyright Act. The so-called new type face design is inevitably based on variations on one of the most fundamental of public domain properties, the alphabet. We doubt that the courts would allow the Copyright Office to impose obstacles on the use of that public domain asset. The accumulation of type face designs in the last few years, all in the public domain, make it even more improbable that the courts would grant copyright protection to these presentations of the alphabet which inevitably bear strong resemblances to some of the infinite varieties of type face already in the public domain. All of which, if they are to be used for printing, must depict in recognizable form the letters A, B, C, et cetera.

Variations of allegedly new designs will inevitably be so trivial as to affront the courts and to burden the Copyright Office with an impossible task of examination. Will a short serif in place of a long one be sufficient variation from several existing designs to entitle the "new" design to protectionism? If the new design varies from existing designs only in the placement of cross strokes, high instead of middle, or the length of ascenders or descenders, will that support registration or will that justify validity in court, where the question would ultimately have to be decided?

It is argued that the design of publishing type faces requires skill and an investment of money, hence it is entitled to copyright protection. By many other contributions to literature, art, scholarship and the film, to cite a few of the media, also require skill, talent, the risk of funds, and are not copyrightable. The crafting of quality paper and ink for example is also a labor involving these elements, yet these other tools for publishing copyrighted books are not in themselves copyrightable.

The most valuable contributions made by the greatest writers are the ideas they introduce for the first time in their works. Yet ideas are not copyrightable, no matter how much talent, indeed genius, was required to produce them. The facts uncovered by skilled, painstaking research, often at considerable expense, cannot be protected from use by others under the Copyright Act. They are not copyrightable.

The copyrighted films of D. W. Griffith and other great innovators presented to the public and other film makers techniques of the greatest artistic and commercial value. The close up, the montage, the cut and the dissolve, each was a brilliant, innovative, film technique. These were great artistic conceptions recorded on film, not ephemeral. Yet each new film technique was the product of skill, imagination and creative effort of the highest order. None is copyrightable.

There are many other examples. Joyce created a new technique for communicating literary experience and expression, the stream of consciousness. It is not protected by his copyright on *Ulysses*. Sherwood Anderson or Gertrude Stein or Ernest Hemingway, depending on your choice of critics, brought a revolution in the writing of dialogue. Despite the talent which was required to reshape literary technique, none of them could use the copyrights on their works to prevent other authors from copying detail for detail these techniques.

Our second point: The registration of type face designs is an almost obvious self-defeating step which would create unacceptable risks in departing from the large pie of public domain designs. By this I mean that if the purpose of registering, and thus giving the Copyright Office's imprimatur of copyrightability to new publishing type face designs, is to encourage the creation of new designs by the various companies and designers competing in the marketplace; registration will not have that effect. Not, certainly, in the field of book publishing.

In reality, registration will have the opposite effect, with the possible exception of a very few large and powerful firms enjoying a dominant position in the industry. Where they can use that power to profit from your amendment of these Regulations.

In recent years there has been an enormous increase in the number of type face designs. Accomplished, it should be noted, without the benefit of Copyright Office registration or copyright protection. A 1952 text says almost 1500 faces of type are in general use in the United States. In his monograph on the printing industry, a recent publication, Victor Strauss noted: "no single printing plant can afford a full stock of all available types, nor would any individual plant have sufficient demand for the thousands of individual faces and sizes in which type comes." The point is obvious.

From this vast reserve of public domain faces and sizes, any book publisher can select a great variety of unprotected designs to meet every conceivable need. These can provide legible, handsome type for every taste, and given the secondary and purely functional purpose of type face, there would be no compelling need for a publisher, or his printer, to commission new designs. In fact, I might note that there are substantial economic reasons right now why they shouldn't.

But in any event, in the face of these considerations, your recognition of copyright protection in allegedly new designs for publishing type faces, would surely stifle their development. Why should a publisher risk the "opulence of retribution," as Judge Dowling put it in a recent case, by indulging the commission of a new design? Why should he do this when it would open the door to the possibility of an infringement suit with the consequent costs and burdens, even if successfully defended? No less the threat of the panoply of remedies if he should lose.

If a new design is used, then some other outraged designer or powerful competitor may claim that his copyrighted design has been infringed, pointing to similarities of serif, width of characters, weight of face, length of ascenders and descenders, or the placing of cross strokes. The suit may be brought in good faith, based on the imagined or actual similarities, both of which probably derive on both sides from existing public domain design. But access and similarity are enough to put the publisher to the costs and burdens of suit, preparation of pleading, motions, pretrial proceedings and the like, even though they may ultimately prevail.

All of this would be avoided if the publisher simply chooses one of the unlimited number of suitable and well known designs already in the public domain. Moreover, the publisher avoids any risk of damages by completely eschewing new designs, and sticking to the public domain faces. Finally, and this is most important to authors, both the publisher and the author avoid the horrible risk that the publisher's designer has consciously or unconsciously—and it can happen unconsciously with the same legal consequences—committed infringement in the creation of the design. That could lead to the issuance of an injunction against the further distribution of the book and its infringing type face, and indeed to the destruction of all existing copies produced by the publisher in all innocence and at great expense.

Authors could not afford this state of affairs. And all of these risks could be avoided by not commissioning the creation of any new type face in the publication of any book or journal, and in using safe public domain designs, drawing on that vast and varied reservoir we already have. I can tell you that any author with half a brain in his head would insist, by contract, that his publisher commit himself not to use any new type face were these Regulations adopted. The risks are simply so overbalanced and unacceptable as to make it sheer stupidity to do otherwise.

Considering that the type face is not what the publisher is seeking to sell, or the publisher is buying in the case of the book, there is no reason to accept these risks. Type face is merely one of the tools used to communicate the work itself, the author's book. The publisher has to assume the risk of infringement on the text of a book, otherwise he can't publish it. But he doesn't have to assume

the risk of infringement on the type face, he can publish the book without doing that.

In sum, on this point, I repeat (and I don't apologize for repeating because I think it needs repeating many, many times before you finish considering this proposed rulemaking), there will be precious few new designs used in the type of books and journals, or other published works, if your Office adopts the proposed amendment and the courts were ever to validate it.

I am deeply concerned by the rulemaking process because from my own bitter experience in the past in litigation, I know that the Copyright Office Regulations are wrong as they can be, and I think some of them are very wrong as in the case of the manufacturing clause, are self-fulfilling prophesies. This is a result of the unfortunate fact that the courts are often too lazy to study the law themselves, and bound to accept—not bound, but tend to sometimes accept what you people say the law is. I only wish that you had displayed some of the persistence and investment of energy that you've displayed here in restudying your position on the manufacturing clause. You would have done a lot more for the cause of creativity in this country.

Our next point concerns the impossible task of examining. We've already noted the vast panoply of existing type face designs in the public domain. The Copyright Office proposes to examine applications for registration of new designs. The rule making seems to suggest it may, and as Mr. Solo points out, it probably should. It faces an impossible and costly task. We would be less concerned about this aspect of the problem were it not for the Copyright Office's intention to make authors pay for the escalating costs of its operations, through onerous and unfair increases in registration and renewal fees. These increases which you are demanding of the Congress, in bills you've introduced in both houses, will fall most heavily on poets, short story writers and authors of articles, and of other works who must register and renew many separate copyrights and short pieces every year.

The amendment of the Regulations, as I pointed out, is a completely unsuitable means of changing the status of type face designs. Under its Regulations the Copyright Office can really only recognize that a work is copyrightable or not copyrightable. If it chooses to recognize the copyrightability, it cannot prescribe substantive conditions for protection, or change rights and remedies granted by the Copyright Act. If type face designs are recognized as copyrightable, the proprietors of those copyrights would be entitled to enjoin publication or further distribution of the book set in the infringing type, even though the author, the proprietor of the copyright in the text, and the publisher had no connection with the making of the design or even its choice.

Copyright Office Regulations cannot prevent these remedies from being imposed, if the typeface is copyrightable or the registrations recognize it as such. The Copyright Office simply cannot assure authors that suits will not be brought, or that courts would not grant these remedies once they're accepted. All the protestations which you have repeated on behalf of those proposing the amendment, that no one would ever think of suing are only ridiculous. Anybody who has read the history of copyright litigation knows that plenty of people of good faith bring copyright suits, and I daresay had we recorded their conversations in proceedings such as these before copyrights were extended in a particular medium, we would have heard similar protestations.

In any event, legislation isn't written on the professions of bona fide goodwill on the part of those who seek a power. If they're not going to exercise the power, why do they want it? Obviously it's sought in order to be implemented, and it will be implemented by litigation and by the imposition of these remedies.

In short, if the courts (should you proceed with your determination to change the Regulations) accept the Copyright Office's opinion—even though it were erroneous—that typeface had suddenly transformed itself into a copyrightable material, authors and publishers would be faced with serious risks which they would have to avoid by a very simple form of insurance which totally destroys the whole purpose for which it is alleged that registration is now sought—namely encouragement of new design.

Finally, I'll make this very brief comment. If the Copyright Office reverses its present interpretation and Regulations, and now holds that typeface and type fonts are registrable, copyrighted material, we assume it would then have to take the position that works which had entered the public domain could not be duplicated by the unauthorized offsetting or photocopying of any edition which was set in a typeface design protected by copyright. In other words, although the copy-

right on the text had expired, if the copyright on the typeface remained in effect. appropriation of that typeface by photocopying or offsetting would be copyright infringement.

We look forward with the keenest interest to the dialogue on this question between the Copyright Office and the National Education Association. the American Library Association, and the Association of Research Libraries. Thank you very much.

Ms. RINGER. Thank you. I hope you will send us the text of your prepared statement.

Mr. KARP. Yes.

Ms. RINGER. This will help us in transcribing. I think the only point I want to make is with respect to the revision of regulations in general. It is very difficult to change regulations once they have been in effect for some time, and yet it is sometimes imperative to do so. There are areas where the law does change, and where the regulations have to change with the law. I would suggest to you in the strongest possible terms and I would make this same comment to the entire room, that if you disagree with our regulations in any area, the very thing to do is to challenge them and ask that we review them. Specifically, I would welcome a challenge in the area of the manufacturing clause.

Mr. KARP. We certainly take that advice seriously. Let me say one thing about your comment on changing Regulations and the need to modify them.

You obviously are involved with a very serious collection of substantive questions. Now, these questions existed, if they existed, since 1967. From 1967 to 1974 is a period of seven years, and this was ample time in which the problem could have been brought before the Judiciary Committees of the House of Representatives and the United States Senate, which as you probably are aware, were engaged in a study of the Copyright Act and its revisions.

Now, certainly something of this major importance was worth calling to the attention of those committees as they engaged in the task of changing the law. In fact, it's not too late for you to avoid the difficulties of this administrative action, which I don't think is required in any event. by taking the problem to Mr. Kastenmeier and Senator McClellan saying: "Look, I forgot about this one; here's another problem. Do you or do you not think this type of stuff ought to be protected by copyright?" Then we and Mergenthaler Company can argue it out before the Judiciary Committee. You will be relieved of all of these problems and all of this time consuming process. and the Congress which is really supposed to make the law—and what you're doing is making law here—can take the job in their hands as they go about remaking the rest of the copyright law.

Ms. RINGER. I don't essentially disagree with you; in fact I think I fundamentally agree with you. I would ask you, in return what is your feeling about the design bill in this connection? I think that inevitably we will have to discuss both type face designs and design protection generally in the context of the revision of the copyright law.

Mr. KARP. Oh I don't mean to duck the question and I'm not going to. I would rather leave to the gentleman who will follow me, who is an expert on the subject, an analysis of the design bill. He's the tall one with the beard. What I will say is I don't think that any provision of any law should permit a man who creates the 3,472nd variation on the alphabet in common use in this country, to prevent others from publishing books by law suits because he claims that they copied their variation from his variation.

Ms. RINGER. Thank you. It's ten till one, and I'll leave it to the next speaker, who is Alan Latman, whether he'd like to start and break after ten minutes, or whether we might break now and return at ten till two. All right, let's stop, and let's try really to get back and started by 10 of 2:00.

LUNCHEON RECESS

Ms. RINGER. The room has been rearranged a bit in the hope that you'll be able to hear and see us better. We're putting the speaker at the end of the table now in that he or she will be speaking more directly to the room.

The next speakers will be, in this order: Alan Latman, Warren King, John Schaedler, Fulton Brylawski, Howard Rockman and Henry Leeds. Mr. Leeds has asked that we break at the end of his presentation so that equipment, the projectors and screens. can be set up. After him will come Matthew Carter, Sandi Quinn. Joseph Gastell, Edward Rondthaler, and Mike Parker. Mr. Ephram Benguiat asked to be knocked off of the list since his points had been covered.

If there is anybody else who wants to speak, please let the receptionist know, and we'll work you in at the end. I think we can probably get done by 5:30 under this schedule; let's hope so. Okay, Mr. Latman.

Mr. LATMAN. I guess I'm the tall guy with the beard. My name is Alan Latman, I'm a member of the New York City Law Firm of Cowan, Liebowitz and Latman. And although I am expressing my own views on the copyright question raised by the Register, I represent two associations today. These are the International Typographic Composition Association and the Advertising Typographers of America, Inc. The combined membership of this group is about 350 small commercial and advertising typographers throughout the country. I say small, because I understand the average is well under $1,000,000 in sales each year of the member companies.

My clients, who have been referred to generically this morning, are the "man in the middle." As typographers they buy type fonts, traditionally from the same people who sell them typesetting equipment, to service graphic arts users, such as advertising agencies, publishers, printers, public institutions, any disseminators of the printed word, and indeed, the public and industry in general.

My clients share my view that creative designing deserves its reward, and that very often federal statutory protection is necessary to achieve that reward. At the same time, my clients and I believe that copyright is not the proper vehicle for protection of type face designs, and that the established practice of the Copyright Office is well-founded.

As the Register noted, this is the first occasion on which the views of interested persons have been solicited in a more or less formal setting on a question of Copyright Office practice. To the extent that this affords the Register an opportunity to get a broader spectrum of views, this is of course to be commended.

On the other hand, the Register may have already come to feel like the 6th grader asked to give a book report on the book about penguins, who says: "This book tells you more about penguins than you want to know."

What I'm really suggesting is that in raising the issues that have been raised by any proposed change of these Regulations, there are legitimately raised issues of economics, special antitrust considerations, compulsory licenses and things too fearsome to mention. I have no particular expertise in either the technical or the economic aspects of typography. I will accordingly focus on the matters within my experience, namely copyright principles particularly in the works of art field. I will, as I warned Dorothy Schrader I might do, and in the tradition of televised activity recently, yield five minutes if I may to Mr. Walter Dew, the Executive Director of the Advertising Typographers Association, who will explain, I hope, in a five minute nutshell why my clients are here, and why my views on copyright coincide with their views on the realities of the marketplace.

I am accompanied not only by Mr. Dew but by Mr. Charles Mulliken, who's the Executive Secretary of the International Typographic Composition Association, Mr. Charles Moore, immediate Past President of the Advertising Typographers Association, and Mr. Gordon LaFleur, who is the President of the International Typographic Composition Association—all of whom are available if questions on the technical aspects of typography or economic aspects are required. Also we will undoubtedly take advantage of an opportunity to submit some written views, if it appears appropriate.

As the Register knows, my interest and involvement in the field of protection for creativity in designs dates back 20 years. This interest for a number of years centered about my role as counsel for the National Committee for Effective Design Legislation, an inter-industry group of designers and manufacturers and their respective associations seeking new federal legislation protecting designs against piracy. The efforts of this committee are indeed embodied in the bill referred to this morning, Title III of S. 1361, passed by the Senate two months ago—and currently pending before the House of Representatives. This bill represents, in my view, the best thinking on an equitable and yet effective system of statutory protection for designs of useful articles.

Now, of course, this morning I have not heard any of the proponents testify orally. I have seen some of their letters and statements in favor of a change in Copyright Office practice. From what I've seen, the proponents of change today are really here for the same reason that the National Committee for Executive Design Legislation went to Congress. The reason was and is that the copyright law as we know it simply does not cover all designs of useful articles, even all creative ones.

There is, I have to interject, an interesting difference in the lineup of people involved in the broad design efforts that I've referred to and in the efforts today. That is, without beating this to the ground, despite being a tall guy I was a David really, or representing David against Goliath in terms of seeking protection. It was the small people in every industry who came forward, and it was the big people in every industry who tried to stem the tide. Now, apparently the situation is somewhat changed today, and the proponents certainly are not the little fellow.

Without suggesting that the Register should make up her mind on the basis of who testifies and says what, I think the Register will agree that nobody in this country has been more sensitive to the needs of creative people, no matter what form, no matter how subtle the need, than Irwin Karp, and no society more vigilant than the Authors League of America. So I find it extremely significant that Irwin and the society, far from even remaining neutral on this issue (which would normally surprise me if the rights of creators are involved), comes in and effectively testifies against the change.

I said before that the design bill recognized the fact that not all designs are covered. I parenthetically note something else which the Register is aware of, and that is that those relatively few designs of useful articles, which do somehow or other qualify as works of art, probably would get excessive protection or inappropriate protection. So the National Commtitee for Effective Design Legislation became convinced that a change in legislation was needed, and I frankly think that today's proponents must follow the same route.

Indeed, I think that the special circumstances surrounding this particular type of design make this particular type of design the least likely candidate I can think of for any preferred treatment in the copyright law. Some of the reasons have already been stated; I will just briefly note them. First, the function of type face designs and the constraints resulting from that function. Secondly, the fact that the ordinary observer, the cherished individual under copyright law, is generally incapable or uninterested in making the kinds of visual or aesthetic distinctions that are implicit in a copyright system.

Notwithstanding my disclaimer of expertise in the field, there are two facts which are apparently uncontroverted, and which are so glaring and so unique that I think I ought to mention them. One is, as already mentioned even by me, that type fonts are traditionally sold only by the manufacturers of the equipment on which they're used. And secondly, that type fonts are not interchangeable or compatible on different equipment. Maybe I'm too traditional in my views on copyright, but in stretching for an analogy I suppose I would think of a situation where let's say a phonograph record could only be played on the equipment of a particular manufacturer. A copyright on the song would therefore have meaning only if that manufacturer were to decide to put the song out in that record.

Now, if one of the many close students of copyright in the room quarrel with my analogy and say, ah hah, but there's compulsory license in records, then I'm reminded of something else which I hope is not name calling. Going through my mind this morning with the references, particularly Mr. Ebenstein's references, to some of the forces at work in this thing, somehow the name Aeolian Company came into my head—the company which, as everyone knows, was involved in a concentration of music copyrights back in 1909. So I think maybe the analogy does stick.

In order to perhaps give the rationale for my thinking, I'll be obedient and answer the five questions in the notice of proposed rulemaking. The first is whether type fonts as useful articles can incorporate original design elements capable of being identified as works of art within the scope of the present copyright statute. The Copyright Office's attempt to construe the statutory term works of art, particularly as embodied in useful articles, which is the sticky area, is found in section 202.10 of the Regulations. Now, as correctly noted, in question one, and I don't think controverted, although we have yet to hear all witnesses, I think that type fonts are useful articles.

They function as mechanical contrivances to produce legible, effective words on a printed page. Question one seems to me to echo subsection (c) of the Regulation which Mr. Ebenstein read this morning. It is in this subsection which the Office very bravely attempts to draw the line between works of art deemed copyrightable, and other designs which, though attractive are deemed not copyrightable. The hallmark to protectibility of shapes of useful articles is the in-

corporation of "features such as artistic sculpture, carving or pictorial representation which can be identified separately and are capable of existing independently as a work of art." Again, it is difficult for me to think of any situation which fits this description less than type fonts, where the design elements are inextricably connected to the utility of the font in producing effective type—something illustrated by earlier speakers.

More independence of appearance can be found, also as expressed by Jim Silberman, in the shape of a piece of *Jensen* silverware for example, or an *Eames* chair, or a *Vacheron* watch. However, none of these presumably is a work of art within the scope of the present law. None of them, in the words of the *Rosenthal* v. *Stein* case, "appears to be within the historical and ordinary conception of the term art." This definition of course was the one that the District of Columbia Court of Appeals chose to apply in *Bailie & Fiddler* v. *Fisher* when it held that a phonograph record in the shape of a five pointed star is not a work of art.

I would suggest that the shape of a letter of the alphabet is no more "art" than a five pointed star. And although the notice in the *Federal Register* referred to recent judicial developments, I do say quite candidly that I am not aware of any cases that have significantly altered this approach. Since I'm not really even sure exactly what developments are being referred to, I would appreciate the opportunity to learn what they are and to have a chance to respond and comment on them.

The second question is the distinctions, if any, between calligraphy, ornamental lettering and type face designs for copyright purposes. "Ornamental lettering" presumably involves pictorial or sculptural features which are separately identifiable and capable of independent existence as a work of art under the standards which I mentioned earlier. It therefore would be, I think, in sharp contrast to ordinary typeface designs and ornamental lettering may often be copyrightable. I understand, however, that it is impractical to create and/or market a typeface design consisting of ornamental lettering and that, accordingly, the problem is not a pressing one. But any way, that is my view on it. I may be wrong on that.

I'm also not sure what is meant by the term "calligraphy" and I'm delighted to notice that a calligrapher is on the program for today. It had always occurred to me that calligraphy connoted beautiful handwriting. In the absence of hand-drawn, ornamental lettering, I would think even beautifully shaped handwriting is not really copyrightable—but I would like to give this matter further thought if it is deemed of continuing importance.

Question three: whether a typeface design can by its nature incorporate the degree of originality and creativity necessary to support a copyright. This is a little related to the first question, and I think the negative answer that I gave to that first question really leads to a negative answer. "Originality" involved in producing an effective alphabet—or even just an attractive alphabet—would remind me for example of the effort to produce an effective fleurs-de-lis design for a label. As the Register knows, this effort was found to lack originality, in *Forstmann Woolen Co.* v. *J.W. Mays, Inc.* [89 F. Supp. 964 (E.D.N.Y. 1950)].

It is the nature and function of typeface designs, highlighted by Mr. Solo, as well as the experience of the Office, that justifies the conclusion, in Section 202.1, that "mere variations of typographical ornamentation, lettering or coloring are not subject to copyright." I think that specification is merely an example of the basic principles that are followed in § 202.10.

When I say the function of a type face would seem to preclude copyrightable creativity, I am not suggesting that variations are impossible or attempting to demean the efforts of people like my respected neighbor from Croton-on-Hudson, N.Y., Ed Rondthaler. But what I'm saying again is that it's very difficult to think of an article whose appearance is more affected, if not dictated, by its intrinsic function than a typeface design. Maybe the elusive concept is the nature of the function, because the function itself is a visual function. I think we perhaps confuse visuality with aesthetics. The fact that it's a visual function doesn't make it an aesthetic function.

The function of type face is similar, as Irwin Karp mentioned, to the design of the finish on paper, the color of a traffic signal, the reflector on a road sign or lighting of a sculpture display—all of which are very carefully designed but without copyrightable creativity. And again, as pointed out, the very conventions that must be observed in the area of making an effective alphabet recognizable dictate the appearance to a remarkable degree.

We are thus reminded not only of the temperature chart cases, but the printed circuit boards, which I gather you folks are still being deluged with each year, notwithstanding your policy. These are very attractive mazes. I have a very nice slide which you may have given me at one point, Barbara. I usually project that on the screen to students and ask what they think this is, and I get all sorts of projective answers. I think that a printed circuit board looks the way it looks because of the circuitry involved. Typefaces look the way they look because they're designed to produce recognizable, legible, effective alphabets.

Question four: whether for purposes of copyright registration workable standards can be established for distinguishing "new" designs, based on previously existing typefaces from mere copies or minor variants of earlier designs. I don't think that such workable standards can be established. But even more significant is the fact that the question needs to be asked. The essence of "copyright registration" as we know it precludes "distinguishing" works submitted for registration from previous works. Thus, the question, as has been really brought home already this morning, reflects the dilemma that would confront the Office if it modified its present policy.

The Office would either have to modify its entire approach and engage in the kind of judgmental activity many people think is beyond its statutory authority, or else it would have to register claims in many designs which the Office not only suspects but really has to know essentially duplicate earlier designs. And that first horn actually has two subhorns to it, I mean do you modify your entire approach from beginning to end, or do you engage in what I think would be a very inappropriate, inelegant kind of discrimination in one particular field? I find the dilemma unthinkable—really, unanswerable.

The fifth question is, assuming the potential copyrightability of certain typeface designs, the practical means of complying with the formal requirements of the copyright law as to notice, deposit and registration. Whether practical means may be devised for complying with notice requirements depends on which school of thought defines the requirements. As pointed out in the monumental notice study, the revision study, there are two approaches. Under the more liberal approach, a single notice on an entire font, as it is sold, would probably be sufficient even if the notice never appeared on a printed page.

The dangers of infringement, well documented by Al Wasserstrom, Irwin Karp and others this morning, would be exacerbated in the case of such an approach in typeface designs. Again, considering the fact that works of art could be registered in unpublished form, the dangers are even greater. If the stricter approach was taken, who knows what that stricter approach would lead to. Do you need notice each time it's reproduced? Do you need it on each character? Suppose they're rearranged, is that the same work? The fact that it would be impossible, and I'm sure the people that follow me would say that they can't do that, doesn't necessarily mean that this stricter approach wouldn't be followed. What it really illustrates is the fact that the copyright statute was never intended to cover typeface designs.

Deposit and registration may raise other problems centering about whether each font of a particular typeface is a separate "work." The thing that strikes me there is the fact that when you have one design you may have as many as a dozen fonts which embody that design. Thus, for each design introduced there may be a dozen different "works" which would arguably be involved, with deposits and applications for registration containing appropriate "new matter" information for each. These problems are, of course, not insurmountable. Again, however, they may well support the long-held conclusion that the statute was not intended to cover typeface designs.

I think the foregoing indicates that there really is no sound reason to change Office practice and grant registration to typeface designs, leaving uncovered many other areas of creative design where the problems are much less formidable. I think typeface designers should join the designers of other products in supporting the Design Bill, which, in answer to the earlier question, I do think would cover some typeface designs, not all, by any means. Nor would the protection be anywhere as broad as under copyright. But that, rather than being a vice of design bill coverage, I happen to think is a virtue. The existence and progress of that Bill is merely further confirmation of my view that copyright under the present law is not the place for protection of typeface designs. If I haven't gone over my time, I would like to call on Walter Dew to join me and give his brief statement.

Mr. DEW. As Alan said, I'm Walter Dew. I am executive secretary of Advertising Typographers Association. I speak now to the economics as concern a comparatively small group of small companies who feel that the economic conse-

quences of copyright would be of major importance to them—yes, even disastrous. So very briefly I would like to make the points which concern us.

The point of non-compatibility between equipment has already been made several times this morning. It is important to us. A typographer, to be competitive, must have a wide range of typefaces available to service the creative demands of his clients. In most cases, it is the client and not the typographer who decides which typeface shall be used on any given job. Although the typographer is the actual purchaser of the type font from the manufacturer, the demand for new typeface is created not with the typographer, but with his client.

One example: the International Type Face Corporation produces a publication called "Upper Case, Lower Case," which is a promotion piece for its faces, and I might add a very, very good one. It is sent to the typographer's clients. These are creative people in advertising agencies, studios, publishers, direct corporate accounts. The typographer's decision to buy a new typeface is determined not so much on the basis of whether it is needed to fill out his range of faces, or that it is unique, or even that it is good, but often because the demand has been created for it, with his clients. This demand he must meet if he is to stay competitive. If the manufacturer of type setting equipment, which a particular typographer might own, does not manufacture current popular faces for his equipment, that typographer finds himself with a very bad competitive position.

A recent, and I might say horrid, example of this particular situation occurred in a large plant on the Eastern seaboard. Their basic photographic system was the Phototronic. Many of the most popular faces demanded by their clients were not available on the Phototronic, and as a result it was necessary to buy another type setting system, in this case Alphatype, to get the faces their clients demanded. The new equipment was not needed for production but in fact, only added to already excess capacity. The system was installed solely for the typefaces available on it; the cost—well over $60,000.00.

It is the above situation that the typographic industry fears if copyright is granted to typefaces, i.e., to get a particular face or faces, one must buy a whole typesetting system, which we consider a gross economic waste. The typographer's concern is not the proliferation of new typefaces or even that the decision on what faces to have in his library rests to a large degree on his client rather than his own typographic judgment. But that popular faces might not be readily available to his system and available at competitive prices.

WEIL, GOTSHAL & MANGES,
New York, N.Y., June 11, 1974.

Re International Typeface Corp.

Mr. LEONARD STORCH,
Leonard Storch Enterprises, Inc.,
New York, N.Y.

DEAR MR. STORCH: We understand that you are considering the question of whether membership in the International Typeface Corporation could subject you to antitrust exposure. In this regard you have asked us to advise you whether the structure or conduct of the International Typeface Corporation ("ITC"), as described below, raises antitrust problems, and if so, to identify the problems involved and to comment upon potential action which might be taken against ITC or its members for any violation of the federal antitrust law.

As discussed below in greater detail, and based upon the information provided to us, it appears that the activities of ITC present most serious risks of legal exposure under the federal antitrust laws for ITC itself, and for its members who participate in the activities described herein. The conduct in question could result in exposure to actions by the Department of Justice, Antitrust Division seeking an injunction and/or penalties, action by the Federal Trade Commission for an injunction, or action by private parties injured in their business or property for treble damages and/or injunctive relief.

Our understanding of the facts, based on our meeting with you and the materials provided, regarding the background of the phototype setting industry, Leonard Storch Enterprises, Inc. ("Storch"), and ITC are set forth below.

INDUSTRY BACKGROUND

As a general matter there are two basic methods of type setting employed in printing—hot type and cold type. The former involves the forming of lead print characters utilizing large cumbersome equipment. The latter employs electronic/photographic typesetting by the reproduction of images of typefaces taken from type fonts, which are films generally employing all letters of the alphabet, all

numerals, and other symbols such as punctuation marks laid out on the film negatives. These cards, called fonts, are produced in a large number of both styles and weights.

These fonts are generally utilized by typographers who operate type shops to perform type setting services, primarily for advertising agencies, graphic art studios, printers and directly to industries which need prompt printing of visual display of various typefaces to evaluate the overall composition of advertisements, etc. Typographers purchase phototype setting machines from the manufacturers who also supply fonts containing various styles of typefaces. There are hundreds of different styles of fonts in various weights, slants, and widths. In addition, fonts are not interchangeable among the various phototype setting machines produced by different manufacturers. However, as a general matter in the past, most manufacturers of phototype setting machines carry a full line of font styles. If a phototype setting machine manufacturer did not have a font for a particular style, or weight of typeface, a typographer having only that manufacturer's machine would not be able to perform the services for the customer who wanted that particular face.

Over the years, it had been generally accepted in the industry, as well as specifically set forth in the regulations of the Copyright Office, that typefaces were not subject to copyright. When a new or modified typeface appeared in the inventory of a phototype setting machine manufacturer, other manufacturers generally added the face to their own inventories. Unsuccessful efforts have been made to contend either that the face, or the configuration of the letters, numerals or other printing symbols appearing on fonts were copyrighted. Although the Registrar of Copyright has expressed some interest in an argument that some copyright protection may be appropriate, no action has been taken in this area and efforts by ITC and its subscribers, described below, have mainly centered on attempting to change the copyright law to recognize typeface as a proper subject of copyright.

STORCH

Leonard Storch Enterprises, Inc., is a manufacturer of type fonts specifically for use on phototype setting machines produced by Alphatype Corporation. Storch has reportedly had the experience of finding potential and existing customers for its fonts for Alphatype machines unwilling and/or hesitant to deal with Storch because of the activities of the International Typeface Corporation.

Typographers have indicated an unwillingness to purchase fonts for their Alphatype machines from Storch, fearing that their customers will refuse to deal with them if they utilize fonts not bearing the ITC licensed mark.

We understand that such typographers have also been advised, either directly by ITC or indirectly by ITC subscribers and others in the industry, that Storch, or anyone making unauthorized use of fonts or faces offered by ITC or members of ITC, may be guilty of violations of law and could be subject to law suits, monetary judgments, and injunctions preventing them from using fonts unauthorized by ITC. Moreover, customers of Storch and others have received indications that their ability to obtain business from advertising agencies, studios, printers, etc. would be injured if they were to deal in such "unauthorized" fonts or typefaces.

INTERNATIONAL TYPEFACE CORP.

ITC is a corporation formed in 1970 as a joint venture between Lubalin & Burns Co., Inc., an advertising agency and graphic designer, and Photo Lettering Inc. (a subsidiary of Electrographic Corporation) which is a specialty typographer. Mr. Aaron Burns, a principal of Lubalin & Burns Co. is President of ITC. Mr. Edward Rondthaler, President of Photo Lettering Inc., is the Chairman of ITC.

ITC's professed purpose is to create new typefaces and assist subscriber members in the marketing and promotion of new typefaces. In addition, ITC has been active, on the one hand, in seeking to change the copyright laws to provide for copyright protection for typefaces, and on the other hand, in claiming that typefaces are already copyrighted. For instance, ITC advertisements have contained the statements:

"All ITC typefaces are fully copyrighted and their names protected. Copies of these designs obtained from sources other than ITC subscribers are unauthorized."

*   *   *   *   *   *   *

"ITC pays royalty fees to designers for exclusive marketing rights. Copies of these designs obtained from sources other than ITC subscribers are unauthorized."

ITC advertising also contains the following statement:

"Lubalin & Burns Co., Inc., and Photo Lettering Inc., founders of ITC, urge the users of ITC Souvenir [the name of an ITC typeface] to join in a world-wide campaign against unfair typeface copying practices by asking their regular type sources (type shops, printing companies, art supply stores, etc.) to purchase ITC Souvenir only from the following authorized and licensed ITC subscribers. . ." [list of subscribers].

In other advertising the immediately preceding statement is followed by the additional statement: "Help stamp out plagiarism. Buy ITC typefaces only from ITC Licensed Subscribers, the only manufacturers authorized to use this 'ITC LICENSED' mark . . . [mark containing words 'ITC LICENSED' appears]."

The ITC contract with reproducer "licensees" of ITC typeface designs provides that:

"The reproducer may produce Products [earlier defined as film fonts, grids, reels and/or matrices or metal castings] only of its own manufacture, originating its ITC Products only from artwork or drawings supplied by ITC, other than signs and specials, and may not grant or sub-license any rights granted to it hereunder, except Produce re-sale rights for distribution purposes."

The term of the grant is 17 years, renewable for 17 years, provided that the reproducer is not in default. The contract provides that the typefaces remain the sole and exclusive property of ITC, subject to the rights granted. The agreement also states that "the Products of the Reproducer shall bear copyright attribution to International Typeface Corporation."

We are advised that customers of ITC subscribers purchase fonts bearing ITC typefaces for approximately double the cost of non-ITC fonts of the same quality. Many of the ITC typefaces are typefaces which have previously been used and a number of them have been available for use for more than 50 years. Even ITC "created" typefaces may represent merely minor variations from previously existing typefaces used in the market. For example, the ITC Souvenir typeface referred to in the above-quoted statement is elsewhere described in ITC material as a design "based on source material" supplied by the American Type Founders Company, an ITC subscriber—i.e. it is not a newly designed typeface. ITC has in the past claimed copyright protection for the fonts, but more recently has simply required an ITC designation.

Messrs. Burns and Lubalin are reportedly well known to typographers, advertising agencies, studios and printers, and, by reason of their knowledge and experience in the industry, can exercise a good deal of influence with these companies. We are advised that these individuals, others involved in ITC, and ITC subscribers have embarked on a broad scale campaign to induce typographers to purchase fonts only from ITC authorized subscribers. In addition, these individuals and subscribers have reportedly urged customers of typographers to deal only with typographers utilizing ITC authorized fonts. Conversely, typographers and their customers have been advised to refrain from dealing with suppliers who sell non-authorized ITC fonts, and with typographers who utilize non-authorized ITC fonts.

In addition, ITC publishes a newspaper called "U&lc" as a promotional paper for the industry. ITC controls the distribution of "U&lc" and sells advertising space to ITC subscribers. In a letter to subscribers regarding "U&lc," the following appears:

"It would be an effective tie-in for your ad to carry the ITC LICENSED logo showing you as a licensed subscriber. Sort of a 'Good Housekeeping' seal for this 'U&lc' readership."

Another aspect of ITC's activities is its support for the efforts of others in the industry to prevent unauthorized reproduction of typefaces. For example, an ITC press release reports a meeting of the Type Directors Club, and a presentation by Klaus Schmidt, an advertising agency executive, in which it is reported that he stated:

"Refuse to buy bootlegged faces. This means art directors, type directors, type suppliers, graphic arts professionals of all kinds. Too few people are waging the fight against the 'contact-copier' [The release states at this point that: 'these are plagiarists who, with contact printer or camera, get third generation film contacts which are offered as originals']. It isn't enough that individuals or associations work to bring order, common sense, simple ethics back into the business. We all have a stake in its future."

The release goes on to state that Mr. Rondthaler, who is a principal of ITC, "supported these views." He reportedly referred to the ITC "bug" or license mark as a "stamp of ethics." The release then states:

"Created at the suggestion of the Joint Ethics Committee of the Art Directors Club and related organizations to discourage the proliferation of using bootlegged film fonts, this is the first mark for licensing used in the entire graphics arts field."

We understand that the efforts outlined above are typical of the activities of ITC to prevent producers of fonts from being able to find customers for their products unless the producers agree to join ITC or to refrain from producing fonts bearing ITC created (or adopted) typefaces.

THE TYPEFACE GUILD

Early in 1974, ITC announced the formation of the Typeface Guild (the "Guild"), which is described as a new typographic marketing plan for Guild members only. Members of the Guild are given special rates on type specimen booklets, and booklets containing collections of ITC fonts.[1]

Guild members pay for booklets and agree on an application form to an obligation:

"To purchase ITC fonts and grids only from ITC Subscriber Manufacturers who, in effect, make all the above advantages possible. When ordering any specimen booklets, we will furnish one copy of the invoices after proof of purchase from an ITC Manufacturer. We further understand that without that proof, the booklets will be billed at full retail prices and no imprinting [of the Guild members' name on the booklets] will be available."

Similarly, in a letter to ITC subscribers, ITC describes the Guild and states: "To belong to it a typographer must buy his equipment and ITC fonts from an ITC subscriber, such as yourself."

There are a number of phototype setting machine manufacturers as well as fonts manufacturers which do not belong to ITC and therefore would be eliminated as potential suppliers to typographic members of the Guild based upon this requirement.

LEGAL ANALYSIS

Based upon the facts set forth above, it appears that the structure and operation of ITC create a most serious risk of potential antitrust exposure both to ITC and to its members. As indicated below in greater detail, the activities in question appear to raise problems under Section 1 of the Sherman Act, which prohibits contracts, combination or conspiracy in restraint of trade, and Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition.[2]

Concerted refusal to deal

Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act generally prohibit agreements or understandings among companies to refuse to deal with any person. The prohibition against such concerted refusals to deal or group boycotts is considered to be *per se* violation of the antitrust laws, and unlawful regardless of the purpose or effect of the concerted refusal.

In *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U.S. 457 (1941), in a factual situation quite similar to ours, the Supreme Court held that concerted refusals to deal are *per se* unlawful, and therefore prohibited regardless of whether they are motivated by anti-competitive desires.

The Fashion Originators' Guild of America (FOGA) was created by designers, manufacturers, converters and dyers of women's dresses for the purpose of preventing "style piracy", which involved the reproduction of dress styles by persons other than the creator of the style. In furtherance of this effort, FOGA members refused to deal either with these so-called style pirates, or with persons who dealt with them. FOGA also penalized members which it caught doing business with such persons.

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[1] Originally the Typeface Guild was to have included a special composition service, at special Guild member rates, whereby only members could obtain typesetting for typefaces which they did not carry in their inventory thereby permitting them to do sample work without a large investment in a whole set of fonts. This service, which at least has been deferred for the present, also permits ITC to keep typographers from seeking fonts not in their inventory from other sources.

[2] Although the practices discussed may also raise questions in the area of resale restrictions (See, *e.g.*, *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)), and in the area of exclusive dealing restrictions (See *e.g.*, *United States* v. *Standard Oil Co. of Calif.*, 337 U.S. 293 (1949)), we have been requested to focus on any group activity by ITC and its members which may produce an unlawful group boycott. Thus, we have not addressed other possible violations.

FOGA was affiliated with the National Federation of Textiles, an organization composed of textile manufacturers, converters, dyers, and printers. Those companies which were also affiliated with FOGA agreed to sell their products only to those garment manufacturers who in turn had agreed to sell only to retailers who refused to deal either with style pirates or with persons who purchased goods created by style pirates.

The Court described the activities of FOGA as a system of sale under which: ". . . (1) textiles shall be sold to garment manufacturers only upon the condition and understanding that the buyers will not use or deal in textiles which are copied from the designs of textile manufacturing Guild members; (2) garment manufacturers shall sell to retailers only upon the condition and understanding that the retailers shall not use or deal in such copied designs."

Significantly, replacing but a few words in this statement by the Court of the standing that the buyers will not use or deal in fonts which are copied from the

"(1) fonts shall be sold to typographers only upon the condition and under- designs of font manuacturing Guild members; (2) typographers shall sell to advertising agencies, graphic art studios, printers etc. only upon the condition and understanding that they shall not use or deal in such copeid typefaces."

understanding that they shall not use or deal in such copied typefaces."

This latter statement appears to fairly summarize at least some of the activities of ITC.

The Court found these FOGA activities to be unlawful under Section 1 of the Sherman Act (as well as Section 2 of the Sherman Act, which prohibits monopolization or attempts to monopolize) stating:

"And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy [citing cases]; subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott [citation omitted]; takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs [citation omitted]; and has both as its necessary tendency and as its purpose and effect the direct supression of competition from the sale or unregistered textiles and copied designs [citation omitted]."

The FOGA had claimed that their practices were reasonable and necessary to protect the industry from style piracy. In response to this the Court stated:

"As we have pointed out, however, the aim of petitioners' combination was the intentional destruction of one type of manufacture and sale which competed with Guild members. The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts."

Indeed, the Court went even further in concluding that: ". . . even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law."

The Supreme Court has consistently maintained the position that any group action designed to shut off the availability of a product to competitors, no matter who sponsors or who participates in the activity, violates the Sherman Act (See *e.g. Klor's Inc.* v. *Broaway-Hale Inc.*, 359 U.S. 207 (1959), where the Supreme Court found unlawful a combination between a large retailer and several suppliers for the purpose of boycotting an offending retail competitor; and *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), where retail Chevrolet dealers and General Motors were found to have engaged in a group boycott designed to drive other Chevrolet dealers out of business).

As noted above in discussing the *Fashion Originators' Guild case*, the facts involved there are remarkably similar to the circumstances concerning ITC. Thus, it appears that ITC and its subscriber members have embarked on a campaign not merely to affect a change in the copyright law,[3] but have gone further and are seeking to eliminate certain competitors from the market place by themselves refusing to deal with the offending competitors, and urging and inducing typographers and customers of typographers to refrain from dealing with these

[3] Although joint activity seeking legislative changes enjoys limited insulation from antitrust liability, such activity must constitute a good faith effort to change the law. Sham efforts to destroy competitors under the guise of legislative activity have been found unlawful. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972).

companies which produce fonts containing typefaces used by ITC and designated as "ITC Licensed."

Set forth below is a summary of specific practices of ITC and its members as well as the ITC created Guild, which present the basis for concluding that a violation of the antitrust laws may well exist:

1. ITC, in its advertising and other public statements, as well as in the structure of its organization, has repeatedly encouraged typographers and others in the industry to refuse to deal with persons producing "unauthorized" fonts, i.e., anyone using an ITC created (or adopted) typeface. In addition, this is done regardless of the fact that no proprietary rights exist in connection with such typefaces. (Of course, as noted in the *Fashion Originators' Guild* case, the existence of such rights would not justify the group action.)

2. By the use of the ITC license mark, ITC has attempted to establish an impression among typographers and their customers—unsupported in either the copyright laws or the cases—that any fonts which do not contain the license mark are unlawful and may result in adverse legal consequences to persons using those fonts or purchasing services from companies using those fonts.

3. ITC has endorsed and issued outright invitations to boycott such font producers: "Refuse to buy bootlegged faces"; "Help stamp out plagiarism. Buy ITC typefaces only from ITC licensed subscribers. . . ."; ". . . join in the world-wide campaign . . . by asking . . . regular type sources . . . to purchase ITC Souvenir only that following authorized and licensed ITC subscribers . . ."

4. Notwithstanding the fact that ITC has recognized and admitted that the copyright laws do not provide protection for typefaces, ITC has stated in advertisements:

"All ITC typefaces are fully copyrighted and their names protected. Copies of these designs obtained from sources other than ITC subscribers are unauthorized."

5. The agreement by Guild members to purchase ITC fonts and grids only from ITC subscriber manufacturers in itself appears to represent an effort by a group of competitors to eliminate what they consider to be an undesirable competitor. Thus ITC specifically requires Guild members to boycott non-ITC members in purchasing phototype setting equipment.

At the very least, it would appear that this conduct constitutes an agreement or understanding among subscriber members of ITC as well as Guild members, to create a boycott of organizations such as Storch. Further investigation may well demonstrate that a conspiracy also exists involving customers of ITC members as well as the ultimate purchasers of services from typographers.

In all events, regardless of the scope of the apparent combination described above, membership in ITC, based on its present method of operation and activities, would be likely to expose a subscriber member to most serious risks under Section 1 of the Sherman Act. Similarly, Section 5 of the Federal Trade Commission Act has been consistently construed to prohibit at least conduct prohibited by the Sherman Act. See, *e.g. Federal Trade Commission* v. *Sperry & Hutchinson Co.* 405 U.S. 223 (1972). Consequently, exposure under the Federal Trade Commission Act would also appear to exist for both ITC and its subscriber members, as well as for others acting in concert with them in connection with the activities described above.

Penalties

To the extent that the activities described above do in fact constitute violations of the Federal antitrust laws, ITC and its subscriber members, including members of The Typeface Guild, will be subject to exposure to liability from three potential sources.

In the first instance the Department of Justice, Antitrust Division may institute a civil or criminal proceeding against one or more of the participants who are involved in any combination which is prohibited by the antitrust laws. A civil proceeding would seek to enjoin unlawful conduct and could include prohibitions of conduct which in itself is lawful. Such prophylactic provisions may be included in an injunction to remove the anti-competitive effects of any unlawful combination. The Department of Justice may also institute criminal proceedings for violations of the antitrust laws. Penalties for criminal violations include imprisonment up to one year and/or a fine of up to $50,000 for corporations or individuals.

Action may also be instituted by the Federal Trade Commission, which is empowered to issue cease and desist orders to prevent unlawful conduct in the

future. Recently, some FTC injunctions have contained more expansive provisions such as requiring restitution of money improperly obtained, and the printing of public statements correcting false impressions given. A violation of a Federal Trade Commission cease and desist order is punishable by a $10,000 per day penalty.

Finally, private parties injured on their business or property by reason of a violation of the antitrust laws may institute a treble damage action seeking injunctive relief, recovery of three times the amount of any damages sustained as a result of the violation, and attorneys fees and costs.

* * * * * * *

In summary, it appears that the activities of ITC raise most serious antitrust problems both for ITC itself and for its members. These problems could result in legal action against ITC and its members seeking both injunctions and monetary judgments. Thus, to the extent that our understanding of the facts set forth above is accurate, membership in ITC could subject a member to serious potential liability and, under current circumstances, should be avoided.

If you have any further questions or wish us to amplify any of the matters discussed herein, please contact us.

Very truly yours,

WEIL, GOTSHAL & MANGES.

Mr. DANIELSON. Will you proceed, Mr. Dew.

Mr. DEW. My name is Walter Dew. I represent the Advertising Typographers Association and my colleague on my right Mr. Mulliken, the International Typographic Composition Association. Our interests are parallel on this and I am speaking in behalf of both organizations.

Mr. DANIELSON. I thought he was your attorney. Am I wrong on that?

Mr. DEW. No. No. He is the head of the International Typographic Association. I am the head of the Advertising Typographers Association.

Mr. DANIELSON. Thank you. I made a mistake.

Mr. DEW. But we are speaking together. These organizations represent 350 small commercial and advertising typographers throughout the country. The typographer is the fellow who takes the copy from the advertising agency, publisher, or actually just about anybody, and translates it into type, ready for reproduction by the printer. In doing this he needs various typefaces.

Now, actually among other manufacturers, we are Mr. Parker's company's clients. He is—Mergenthaler is the supplier to our industry.

These typefaces we feel are utilitarian tools of the trade which have as their prime requirement legibility with various styles to best convey the author's message. Our problem is that we are, I guess you would say, the man in the middle on this whole situation. That makes our position on the question of protection for typeface designs perhaps a little different from the others who are testifying today, either pro or con.

This position can be summarized as follows: One, we believe typeface designs are not covered by existing copyright law and are not covered by title I of this bill. We respectfully urge this subcommittee, as we urged the Register of Copyright, not to change this situation so as to cover the typeface designs. Whatever may be the inadequacies of design patents in other areas, we think that they can go far to meet the needs of our industry. Indeed, as Mr. Gastel pointed out this morning, when he was referring to some 10,000 type styles available today in the public domain, he at the same time said there were a thousand which were covered by design patents.

As written, title II seems to slightly expand this coverage. It most assuredly does not cover mere modification or reworking of public domain typeface designs. The proponents apparently agree with this, on this point, and for this reason, as I understand it, they have asked this subcommittee this morning to expand the coverage of title II.

We would oppose any such expansion. We favor, and it is nice to say favor for a change, we favor recognition of the designers' rights in the form of economic incentives and economic rewards, to better create unique, new, and original typefaces so long as they are readily available to all and available at a competitive price. Accordingly, we have no objection to the scope of protection in title II as presently written, with but two provisions or two provisos. First, a compulsory universal licensing provision with reasonable rates should be set forth in the law, and second, the bill should be amended to prevent infringement suits without an actual certificate of registration.

We have noted that the proponents of protection seem to concede the need for licensing. I think that was confirmed this morning. The facts leading to these views are set forth in some detail in our written statement which I request be made a part of the record.

Mr. DANIELSON. Without objection, it is so ordered.

Mr. DEW. A few of these facts are so important that I would just like to mention them briefly now before I conclude.

One, typographers are small companies. Their average gross sales are under a billion dollars annually. They are dependent on a relatively few, relatively large sources of supply, and I mean large sources of supply the size of their supplier companies. These sources supply not only the typesetting equipment we need, but also the typefaces we need to operate this equipment. Copyright would effectively eliminate our only competitive way out today and that is the small independent firm which Mr. Ebenstein represents, that type of small independent organization who does not manufacture typesetting equipment but, rather, provides fonts or typefaces for any and all typesetting equipment.

Now, here I might add that any independent, Mr. Ebenstein's client or any independent, we feel should pay proper compensation to the designer of any typeface that they are making type fonts for.

The situation is particularly acute because fonts of type are not interchangeable or compatible as between the equipment of different manufacturers, or indeed the equipment of the same manufacturers. And Mr. Leeds this morning showed you—these are the type fonts, grids, for two different kinds of typesetting equipment, photographic typesetting equipment, and I am not a technical man but this grid is for a Mergenthaler piece of equipment, I believe. It will fit one type of equipment. You cannot use it to operate another type of equipment, whether of Mergenthaler or Harris Intertype, or whoever the manufacturer might be. In other words, these grids are peculiar to a particular piece of equipment.

Mr. DANIELSON. I wish to just alert the gentleman to the fact that he, too, has had eight plus minutes.

Mr. DEW. Thank you. If I might just summarize as follows, then.

In conclusion, we do not think solicitude for designers who are unlikely to reap the economic rewards in any event should place new weapons in the hands of a few large equipment manufacturers and

their allies. Our industry requires designs unencumbered by a monopoly.

Mr. DANIELSON. Thank you very much, sir.

[The combined prepared statement of Walter Dew and Charles Mulliken follows:]

COMBINED STATEMENT OF WALTER DEW, ADVERTISING TYPOGRAPHERS ASSOCIATION AND CHARLES MULLIKEN, INTERNATIONAL TYPOGRAPHIC COMPOSITION ASSOCIATION

This statement is submitted on behalf of the International Typographic Composition Association and the Advertising Typographers Association. These organizations represent 350 small, commercial and advertising typographers throughout the country. The average, annual gross sales of our member companies are under a million dollars.

Our members are the "men in the middle". As typographers, they buy typeface designs or fonts, as they are commonly referred to, traditionally from the same people who sell them typesetting equipment. These type fonts are used to operate typesetting equipment for the production of typographic composition to service graphic arts buyers such as advertising agencies, publishers, printers, public institutions, display media and other disseminators of the printed word, and, indeed, industry and the public generally.

Our members are of the view that creative designing deserves its reward and that such reward is sometimes dependent on federal statutory protection. Accordingly, we are in favor of some form of protection for type designers that provides economic incentive to create and design good, unique, new and original typefaces, which are readily available to all at a competitive price. At the same time, we believe that copyright is *not* the proper vehicle for protection of typeface designs. For this reason our associations testified before the Register of Copyrights, supporting the established practice of the Copyright Office in refusing registration of typeface designs. We are not aware of any intent thus far in Title I of H.R. 2223 to change existing law and practice in the regard. Moreover, we believe that typeface designs *should not* be covered within the works protected by Title I of H.R. 2223. The reasons for this view follow:

Typefaces, both in text and display sizes and varieties, are important tools to the typographic industry. This is true regardless of the age or origin of the design. At present there are literally thousands of typefaces available to the typographer and his clients. In truth, there are so many, and so often their designs are so similar, that even the trained eye has difficulty in identifying any particular typeface.

Where does the demand for new typefaces originate? We believe the answer is crucial to the subject of this hearing. The demand is created *not* by typographers or even their customers—advertising agencies and other end users—but rather by manufacturers of typesetting equipment or marketing organizations, such as the International Typeface Corporation. As a result the typographer is truly the man in the middle. He is forced by the promotional efforts of the manufacturer/marketer to buy items which he may not want or need.

The consequences of this situation are bad enough today; under copyright they would be intolerable. To begin with, we are met with the obvious economic waste and higher costs inherent in this artificially promoted market. But even more significant perhaps is the question of availability to the typographer of a new typeface for which a demand has been "manufactured". Examination of this question requires a closer look at today's typesetting equipment.

As there are numerous phonograph record players in use today, there are also a number of phototypesetting machines. Those most used in the typographic industry (Sic 2791) include Alphatype, Linofilm, Fototronic, VIP, Pacesetter, Comp/Set 500 and CompuWriter. In all there are about a dozen manufacturers of phototypesetters, each offering many different models. But, unlike record players which can accommodate all phonograph records (produced of course by a multitude of producers other than the phonograph manufacturer) phototypesetting machines will accommodate only the type fonts (typeface masters or matrices) of that manufacturer. No two manufacturers' fonts are interchangeable and indeed, there is not even compatibility between different machines of the same manufacturer in many instances.

Because type fonts are produced by phototypesetting equipment manufacturers, and are not compatible one with another, a typographer may and often does

find that typefaces requested by his clients are not available on his equipment. Without access to currently popular typefaces, a typographer is placed in a most unfavorable competitive position.

A recent example of such a situation occurred in a large plant on the eastern seaboard. Its basic phototypesetting equipment was Fototronic. Many of the popular faces demanded by clients were not available on the Fototronic since equipment manufacturers refuse to grant licenses to independent typeface manufacturers. Accordingly, it was necessary to purchase a second phototypesetter (manufactured by Alphatype) which did have available the faces that clients demanded. The new equipment was installed solely for the available typefaces. It cost over $60,000.

Thus, without independents who can produce type fonts for any or all typesetting equipment, the typrographer's only source for the type fonts for his equipment is the manufacturer of that equipment. Therefore, if that manufacturer is not licensed to produce a new typeface, or does not choose to do so, the user of that equipment is in big trouble—either he does not meet his client's demand or he has to put in new equipment which offers the faces he needs. All of this increases costs for the user, and restricts sources of supply.

We would prefer to see universal licensing of new designs so that independent manufacturers of type fonts could flourish. There is no reason, economic or social, why manufacturers of typesetting equipment should be the only source of type fonts for that equipment. Protection for the designer does not require insulation of the manufacturer from competition in a free market. In no way do we condone piracy and when we speak of independent font manufacturers it is with the understanding that they pay proper compensation to the designer.

Our experience has shown that we are very far from this ideal today because of the restrictive practices of the manufacturer/marketer. This experience convinces us that copyright protection would move us even further from this goal.

Copyright protection for typeface designs would create a complete monopoly for franchisors by providing the opportunity to copyright proprietors to create a demand which could only be satisfied by certain typographers.

The practice of franchising of typeface designs to typographers has resulted in the largest and most successful typographers being chosen as exclusive franchisees. When the non-favored typographers, unable to receive or afford a franchise, are pressed by their clients for typefaces popularized by the manufacturers and franchisors, their only competitive way out thus far has been to meet their clients' needs with "similar" faces.

This practice has, up to now, been limited to display typefaces e.g., those used in headlines. These are assembled manually or by semi-automatic photo*lettering* devices and do not require license by photo*lettering* machine manufacturers. However, at least one franchisor is now providing type fonts for use on phototypesetting machines to produce text sizes with royalties based upon the amount of work produced.

A news article in the February issue of *Art Direction* magazine quotes supporters of copyright protection for typeface designs as wanting royalties of 2–3% of typesetting fees. If such protection were available to generally popular typefaces in use by typographers, magazines, newspapers and others, it is impossible to picture the administration of such a program and resultant cost to the consumer.

Copyright would remove these competitive avenues. Access would be denied in a number of ways.

(a) A typographer could be denied access to a universally popular typeface because he does not have access to a franchise.

(b) A typographer could be denied access to a universally popular typeface because a license was refused to the manufacturer of his phototypesetting equipment.

(c) A typographer could be denied access to a universally popular typeface because the manufacturer of his phototypesetting equipment did not manufacture the type font and independent typeface font manufacturers were refused license to manufacture.

We, of course, are speaking primarily from the point of view of the typographer. But we think the impact on potential competitors of the proponents of change, on the designer, and on the consumer supports our position:

(a) Refusal by copyright proprietors to grant licenses for typeface designs to new firms seeking entry into the field of manufacturing phototypesetting machines could prevent such entry.

(b) The small, independent and little-known typeface designer will not be served by copyright protection because the demand is largely created by manufacturers and marketing organizations for their own typeface designs. And, much if not most, of this work is performed by staff artists who work for wages.

(c) Under copyright, the consumer would pay a higher price. Experience within this particular industry may be unusual but it indicates a price premium of 25 to 100% for "licensed" typeface designs. Moreover, there would be forced obsolescence, as marketing organizations modify the thousands of typefaces in the public domain and promote them under the guise of a new name.

Over and above the foregoing, copyright in the area of typefaces could well produce a rash of litigation or threat of litigation, either of which would drastically reduce the demands for new faces. Today there are literally thousands of typefaces with new entries coming into the market every day. And with all deference to typographic designers, the similarities between some of these faces is astounding. It is a mess today, and a potential catastrophe under copyright.

Copyright protection under Title I could result in typefaces presently in the public domain being slightly modified, copyrighted, promoted, and finally replace the face on which they were based. The risk of innocent infringement by printers, publishers and authors is enormous. Moreover, the minimal requirements of "originality" under copyright law, the large number of designs in the public domain, and the absence of search procedures in the Copyright Office will result in certificates issued for invalid copyrights, but such certificates will nevertheless constitute the means for harassment.

Potentially catastrophic to our industry is a provision in both Title I and Title II of H.R. 2223 (Title I, § 411(a) and Title II, § 220(b)) permitting suits for infringement even if registration has been denied. We believe these provisions to be an invitation to litigation, which in the hands of large manufacturers, would be intolerable and should in any event be deleted.

Thus, the undersigned typographic associations do not believe the appropriate method to insure protection for the type designer is to be found in copyright as it is presently written and practiced, or as it would be presented under Title I.

We note that the design patent route presently affords some protection to the truly new, original and unique design which we think does deserve protection in our industry. Whatever may be the broader protection afforded by Title II of H.R. 2223 to designs in general, it would cover, in reference to typeface design only truly original designs but most assuredly not the mere modification or reworking of existing typeface designs.

The proponents also seem to recognize, in principle, the need for a reasonable licensing plan in the event protection is to be expanded. We must note that talks, thus far, on the specifics of licensing have offered no reassurance to typographers. While some manufacturers and marketers have stated that they would license more readily under copyright, there is by no means common agreement among them. Only one or two giant phototypsetting equipment manufacturers and two or three typeface marketing and franchising organizations have worked for the change. The others have either taken a "wait and see" attitude or have even rejected the idea of gaining protection.

An industry-wide agreement on licensing presently proposed by the proponents provides for licensing between manufacturers of typesetting equipment, but excludes independent type font manufacturers. Another provision allows manufacturers to set their own royalty structure. At the same time, the current policy of a leading proponent of copyright protection for typeface design has a public policy "to refuse to grant licenses to permit others to manufacture font strips and thereby reduce (their) market for the sale of font strips". Thus, licensing decisions, so far, have followed the self-interest of copyright proprietors and are far too restrictive.

We are supported in our view for a requirement of broader licensing by one of the strongest proponents of protection for typeface designs. The American Institute of Graphic Arts. AIGA is an organization of 1700 members who are both typeface designers and typographic consumers—graphic designers and graphic production people who design with and specify typography. Their statement of position issued February 3, 1975 says in part:

"1. We would like to see universal licensing of typefaces to all legitimate manufacturers. We consider it healthy to have typefaces obtainable from more

than one source, provided there is good quality control. Because typeface designs are unique, they must be meticulously and accurately reproduced. Their extension to matrices or grids (fonts) for equipment other than that for which they were originally designed is to be carefully controlled by the original designer or design team. Only with this kind of quality control, which insures compatibility, can designers specify type with the assurance that their finished designs will reflect their graphic plans." and "4. AIGA wants to be certain that the cost to type composition remains reasonable—that a royalty and licensing system will not inflate rates unfairly; it also wants to be sure that any royalty or license charge will be collected only once, when the font or grid is sold . . ."

In addition to the foregoing, the AIGA statement calls for specific legislation to prevent a copyright proprietor from gaining an injunction against an author, printer or publisher who used an unauthorized copy for a protected (type) face. This relates to the concern of the Hearst Corporation, as expressed by Mr. Wasserstrom, and of many other publishers.

We strongly agree that licensing and regulation of fees would be needed before protection is expanded. Because of the peculiar facts of life in our industry, such licensing must be provided in the law. These facts, as mentioned above, include in particular the following: (1) type fonts are traditionally produced only by the relatively few large manufacturers of the equipment on which they are used, and (2) the fonts are not interchangeable or compatible as between the equipment of different manufacturers.

In summary, we think that any increase Congress deems appropriate in the protection available for typeface designs—including the enactment of Title II—should be accompanied by a compulsory license system on reasonable terms. In no event, however, do we believe that copyright protection under Title I is the proper route.

Mr. DANIELSON. And now, Mr. Wasserstrom, could we hear from you, sir.

Mr. WASSERSTROM. Yes. I would be glad to speak.

Mr. Danielson. Congressman Pattison, eminent counsel, my name is Alfred Wasserstrom. I am senior member of the law firm of Lipton, Wasserstrom, and DeGroot. We are general counsel to the Hearst Corp. The Hearst Corp., if I may be permitted to just amplify a little bit on the nature of our client, publishes 11 magazines, 8 newspapers, and conducts a paperback book operation, Avon Books, which is—Avon Books, are published under various imprints, and it also operates King Features Syndicate, a division of the Hearst Corp., which is a rather large, if not the largest, newspaper syndicate in the country.

Only by way of—in a somewhat tangential manner and only by way of giving you a little of my background, I am also and have been for upward of the past 10 years the chairman of the legal affairs committee, quondam, the copyright committee of the Magazine Publishers Association which is perhaps the largest association of consumer magazine publishers in the United States.

Gentlemen, I have no economic ax to grind. I am speaking here in behalf of our client, the Hearst Corp., not in behalf of the Magazines Publishers Association, only because I am not specifically authorized to do that, although I dare say our views coincide. Our committee has not made a recommendation to the Magazine Publishers Association, but only because of lack of time.

As I say, I am here in behalf of the Hearst Corp., and I am here because of what I consider genuine fears that publishers must confront if you were to permit original typeface designs to acquire copyright status.

Now, I want to emphasize at the outset that the kind and type of typography that I am concerned about, and I think solidly and

soundly concerned, not gratitously concerned, is the typography of publishing and if I had any doubts about the efficacy of my position or any doubts about the fears that I had before I entered this hearing room this morning, those fears have been dissipated by what we heard this morning in behalf of the proponents and especially when Congressman Wiggins raised a very pertinent and seminal question when he said I can't get it through my head—I am paraphrasing him and I hope he will forgive me. I am not doing it very well. He said, I just can't bring myself to believe that there is originality in the alphabet, and that is precisely what is the basis of our fear as publishers, and that is that typefaces which are in the public domain and have been in the public domain for hundreds of years and at present have been estimated—the alphabetical designs in the public domain are in the nature of about 12,000. I think that is a modest estimate. What we are fearful of is the existence of but slight modifications. They would perforce have to be minuscule in order to serve—I am talking about minuscule ornamentation, changes of a serif here, or the shape or shading of an arch there—in order to maintain the readability of the typefaces which is the primary purpose of typeface, and also suffice for copyright purposes.

Now, that is the paradox. You can't have ornamentation and readability if you are going to spread them too far apart. You would have to sacrifice one for the other. We are not concerned, and I don't think publishers in general are the least bit concerned about completely ornamental typefaces, typefaces that one would see in a gallery, for instance, that are basically decorative, but what we are concerned about, and deeply concerned about, is that egregious copyright infringement demands will be made upon publishers and who incidentally do not do their own printing in the main. I am talking now about magazine publishers and book publishers. They rely upon printers to do it and typographers who deal with printers to do the typesetting and do the printing for them. So that despite their innocence, the innocence of the publishers, my submission is that they will be or they very well may be subjected to extraordinary demands by copyright owners, if you were to open the door of copyrightability either under title I or title II of H.R. 2223 which is the bill which we have under consideration.

If you were to admit to copyright original typeface designs, the alphabet, the typeface of publishers, the typeface that is used in texts, in books, in magazines, in newspapers, you would proliferate claims and lawsuits for infringement against innocent publishers, those unconscious of any wrongdoing.

But when you rely upon others, as magazine and book publishers do by settled practice, on printers then no matter how innocent you may be under title I which is basic copyright law, and I am not arguing against strict liability in the field of infringement, but I am suggesting here that this particular kind of work which has for many, many years, harking back for more than 65 years to 1910, has been disentitled to copyright status under existing law, should not now be accorded copyright status.

Mr. Danielson. I want to again caution that everybody is even now in fact.

Mr. Wasserstrom. May I——

Mr. DANIELSON. You snuck in a half minute each way.

Mr. WASSERSTROM. Well, I know it is awfully difficult to compress within 5 minutes what one has been saying for a long time. But may I conclude by stating in behalf of publishers: just as words are the raiment of thought, I think typeface is merely the raiment of words and should pass as freely as words do. I am talking about a readable, legible, intelligible typeface and if you were to allow copyright status to this kind of a work, you would subject the publishers to frequent and onerous demands, to the obligation of at least defending lawsuits, and the possibility of paying very substantial sums of money despite their innocence, and most importantly, to the remedy of injunctive relief for infringement; and all without commensurate social benefit. So that my submission would be that the copyright bill that we now have under consideration not be changed and under its present form it cannot accommodate, in my view of either title I or title II, these kinds of original typeface designs that we are talking about, and I also urge your committee not to open the door of copyrightability in any report that you may make on this piece of legislation.

Mr. DANIELSON. Thank you very much for your contribution. You would be surprised how much you said in 5 minutes.

[The prepared statement of Alfred H. Wasserstrom follows:]

STATEMENT OF ALFRED H. WASSERSTROM, COPYRIGHT ATTORNEY, NEW YORK, N.Y.

Mr. Chairman, distinguished members of the Subcommittee, my name is Alfred H. Wasserstom. I am a senior member of the law firm of Lipton, Wasserstrom & DeGroot of 959 Eighth Avenue, New York, New York. We are the general attorneys for The Hearst Corporation. I might add that my law firm and our predecessor firms have so represented The Hearst Corporation for more than forty years.

In passing, may I also state that I personally have for upwards of the past ten years served as Chairman of the Legal Affairs Committee (quondam the Copyright Committee) of the Magazine Publishers Association of 575 Lexington Avenue, New York, New York, which is perhaps the largest trade association of consumer magazine publishers in the United States, if not in the world. However, I am presenting this testimony today not in behalf of that Association or in the capacity of Chairman of its said Committee.

The testimony I am about to present, I submit as a lawyer who represents, and has represented for many years, The Hearst Corporation, and I appear before this distinguished Subcommittee on behalf of that publishing organization. The Hearst Corporation publishes eleven magazines, which are in the main consumer magazines, including such magazines as Good Housekeeping, Harper's Bazaar, Cosmopolitan and House Beautiful. It also publishes eight newspapers, including such newspapers as The Albany Times Union, The Baltimore News American, The San Francisco Examiner and The San Antonio Light. This corporation also publishes a series of paperback books known as Avon Books under various imprints, and it also operates King Features Syndicate, which is one of the largest newspaper syndicates of this country.

I take it that the subject of this hearing and inquiry is the possible copyrightability, in the context of basic copyright law revision (H.R. 2223), of original typeface designs and type fonts. As I understand those terms in their usual acceptations, a typeface design means the particular appearance of an individual letter or character (generally of the alphabet) in type form, and a type font means an assortment, of varying quantity, of typefaces of a particular size or style. Both the typeface and the type font are integral elements in typography, which has been accurately described as "the art of printing".

It is the *typography of publishing* that is my especial concern, and it is to that area that virtually all of my remarks will be confined.

At the outset, and so that my position on this issue may be made unmistakably clear, I submit that publishing or textual typefaces or fonts, even when original, should *not* qualify for copyright status.

Incidentally, when I was first invited to testify at this hearing, I was puzzled, and I am still perplexed, as to why a subject so particularized, one of such limited nature and reach, as original typeface designs, should become a matter of legislative inquiry. I should have thought that typefaces, even when original in a copyright sense, might more fittingly be dealt with in an administrative rather than a statutory way. I should have supposed that the proper rubric would be—if the subject were to be dealt with at all—an appropriate Copyright Office Regulation under sections 701 et seq. of said H.R. 2223.

Now this basic problem of copyrightability of typeface designs is not to be addressed, I suggest, as a novel question. It comes before us freighted with history. Its contours have been shaped, and shaped recurrently, by Copyright Office concern and consideration for the past sixty-five years.

Harking back to 1910, under our existing Copyright Act of 1909, the Copyright Office has consistently refused registration to ornamental letters and typeforms as well as to "mere variations of typographic ornamentation," or "lettering". Hence, in conformity with well-settled practice under existing law, typeface designs have been denied copyright registration.

The non-registrability under our present Copyright Act (17 U.S.C.) of original typeface designs, speaking generally, can be convincingly rationalized, I submit, on the ground that such designs are composed of alphabetical letters and are primarily utilitarian objects rather than works of fine or even applied art in that their purpose is legibility or readability. Such designs basically function, and are intended to function, accordingly, as printed matter to be read and not as esthetic matter to be enjoyed.

Put another way, unless the typeface design in question in its ornamental aspect possesses not only that modicum of originality and creativity required of works of art or of at least artistic craftsmanship, but also an esthetic life of its own apart from its function as printed reading matter, it should not, I urge, be eligible for copyright as a work of applied art.

Of course, we are not concerned here with a purely ornamental design in typeface form, one that could be hung on one's wall to be viewed and reviewed with pleasure deriving from the beauty or harmony of its line, shape or shading. This kind of design, this "thing of beauty" is of no moment in publishing typography, and has nothing to do with reading matter.

However, the typeface design that is of concern to publishers and to authors of written words is the one involving the alphabet, the one that has as its essential use and purpose the intelligibility of the printed word. It is this kind of typeface design, that perforce is based upon the wealth of public domain typefaces (and which can vary from them only in such relatively trivial or minor respects lest it lose its desired utility as a recognizable word form) that has been treated as non-copyrightable under existing law and established Copyright Office practice.

Should the law be changed now to allow for the copyrightability of original typeface designs? I submit, it should not.

But before discussing such possible change and its consequences, I suggest that it might be well to recall, for the sake of perspective, the following observations of T. B. Macaulay when he incisively stated in connection with a copyright duration bill then (February 5, 1841) before the House of Commons:

"* * * We must betake ourselves to copyright, be the inconveniences of copyright what they may. Those inconveniences, in truth, are neither few nor small. Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly. * * *

"The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures * * * I admit, however, the necessity of giving a bounty to genius and learning. In order to give such a bounty, I willingly submit even to this severe and burdensome tax." [1]

I suggest further that, since I oppose change in the present posture of the law, the proponents of change have the materially heavier burden to carry. I say that not to frustrate change that is desirable, but rather because change in the instant matter seems quite undesirable, especially in the light of its likely and harmful consequences to publishers, consequences without commensurate benefit to typeface designers or to the public.

Were typeface designs which are basically functional in nature, that is, those which are capable of serving (and really intended to serve) as intelligible, printed word forms, to be deemed entitled to copyright status by your Subcom-

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[1] *Macaulay, Prose and Poetry*, Ed. G. M. Young, Harvard Press, pp. 734, 737.

mittee, and I trust they will not, could that be brought about without substantive change in H.R. 2223? I submit, it could not. I say that because, although Title I contains no class covering "works of art", denominated in those precise words, there is the comparable category of "pictorial, graphic and sculptural works" found in sections 102(5) and 113 of that Title. These terms i.e., "pictorial", "graphic" and "sculptural", draw color and meaning from one another in view of their association in the single class (item 5). Furthermore, by legislative history as evidenced by Senate Report number 93–983 on S. 1361 on general copyright revision which passed the Senate last year, said section 102(5) is intended to cover works of fine and applied art, but works of art, nonetheless. Hence, in this respect, I think we have basically a mere codification of existing law with the consequence that the same insuperable barrier exists under Title I to the copyrighting of typeface designs as exists under current law. In short, and as urged above, even under Title I, the typeface designs which possess utility and are designed to function as printed textual matter, deriving basically from the public domain (wherein it is estimated there are available thousands of typefaces and fonts developed over hundreds of years), would not, I submit, be copyrightable, despite their small, but really trivial, ornamentation or decoration. (*Gardenia Flowers, Inc.* v. *Joseph Markovits, Inc.*, 280 F. Supp. 776) The ornamental or decorative features such as changes here or there in the shading or shaping of a stroke or serif or in the forming of an arch or curve in the typeface itself, would have no separable existence of their own, being merely ancillary parts of the readable typeface.

It is worthy of note that in said Senate Report anent categories of copyrightable works, no mention is made of typeface designs, although pictorial, graphic and sculptural works are therein adverted to and discussed (pp. 105 et seq, of the Report).

Furthermore, moving from individual typefaces or fonts to typography, it has been held that even especial typography of a published literary work is but a part of the literary work and will pass into the public domain when the copyright to the literary work expires. (*G. Ricordi & Co.* v. *Haendler*, 194 F. 2d, 914)

The question that next arises is whether Title II of H.R. 2223 is so worded as to subsume "original typeface designs" under "Ornamental Designs of Useful Articles". It is my submission that under the so-called design Bill i.e., Title II of H.R. 2223, typeface designs do not constitute ornamental designs of useful articles and are, therefore, not entitled to protection under the last mentioned Title. I believe that there are solid grounds for the foregoing submission, such grounds having among them the following:

A. It is the "intrinsic utilitarian function" of typeface, especially textual typeface, "to convey information";

B. Under section 202(b) a design, albeit an original one, is not entitled to protection if it is "staple or commonplace", or is a "familiar symbol", or is a "configuration which has become common, prevalent or ordinary";

C. Under the last cited section paragraph (c) a design is disentitled to protection even if it deviates from the "staple or commonplace" as well as from the other preclusive provisions of 202(b) "only in insignificant details or in elements which are variants commonly used in relevant trades" and

D. Even if none of the foregoing preclusive provisions of section 202 apply, the design will not qualify for protection if it is "dictated solely by a utilitarian function of the article that embodies it".

An additional, if only makeweight argument, I suggest, militating against the protection of original typeface designs under Title II is that the ornamental feature of readable typeface must perforce be so quantitatively small as not to constitute the "design of a useful article". The utilitarian function of the typeface acts as a delimiting factor, operating both qualitatively and quantitatively on the design so that the latter can only comprise a small part of the typeface, otherwise the typeface loses its legibility. But for the purpose of this argument, we need only consider the size of the ornamental design vis-a-vis the entire typeface and when we do that we see, I submit, that the design can only be a small part of the article, and not of the article itself.

Furthermore, I do not believe that in any of the hearings or drafts of prior Bills dealing with the protection of ornamental designs of useful articles any mention was ever made of original typeface designs as among such ornamental designs of useful articles; such absence supports the contention, predicated upon legislative history, that typeface designs were not among the ornamental designs contemplated. So much for the present wording of Titles I and II of the said Bill now under consideration by your Subcommittee.

I urge you neither to amend Title I or Title II of H.R. 2223 so as to accommodate original typeface designs nor to write into such report on this pending legislation as you may issue any language supportive of either copyright or ornamental design protection for such typefaces. I urge that not only on behalf of publisher but also on behalf of authors because to do so would be to create an especially fertile "litigation breeder", one that would add to the occupational hazards of publishing without compensating public benefit.

As this Subcommittee is doubtless aware, the present Register of Copyrights conducted a public hearing, the first ever by anyone holding that Office, in November of 1974 on the issue of the registrability of original typeface designs. To register such designs for copyright would have necessitated a significant departure from settled Copyright Office practice, as I indicated above. At that hearing, the Register, herself, in the clear and cogent fashion that is her wont, articulated some of far-reaching problems that might well confront publishers of printed matter if original typeface designs were to become copyrightable. In that connection and at that time, the Register precisely posed the pressing question as to what extent may the holder of a typeface copyright "try to enjoin, or exact some sort of payment from a perfectly innocent publisher or author who may have happened to use a typeface design without knowing it was copyrighted" (p. 44 of transcript of said hearing). The Register then went on to say: "But fear has been expressed that this" copyrighting of typeface designs "would enable typeface designers and their assigns to exact a 'tax', or whatever you want to call it, from authors and publishers * * * to put them over the barrel if the work is published and it turns out that the copies have been printed using a 'piractical' typeface design" (p. 45 of said transcript).

As this Subcommittee may not know, many publishers of magazines and of books do not do their own printing. Our client, who is a large magazine publisher, uses the services of an independent printer or printers for the printing of its magazines and also for the printing of its Avon Books. As I understand the practice, publishers not infrequently fail to specify the kind or type of typeface in which text matter is to be printed so that the printer, by fairly well-established practice, may set such text matter in the typeface that he has then on hand from the copy furnished by the publisher. The point I want to make here is that publishers rely upon printers to furnish typeface and fonts. Of course, the publisher may designate what particular style of type he wants, but absent that, he will speak only generally to the question of typeface. It may be a Gothic, Roman, Futura, Baskerville, Bookman, Bodoni, Cheltenham or Caledonia to mention but a few of the perhaps better known styles of type that are available in the public domain.

If you were to accord copyright to typeface designs of text matter, assuming originality of their ornamental features, there would be placed in the hands of copyright owners an opportunity to make egregious demands upon publishers. You would proliferate litigation because you would proliferate putative copyrights. Even if publishers were to succeed in the defense of such actions, they would still have the expense of defending the lawsuits for copyright infringement.

Quite apart from the burden of defending the copyright infringement actions, publishers who are completely innocent of, or even unconscious of, any wrongdoing, may not only be enjoined from the dissemination of their magazines and books but also amerced in damages, and all because of the relatively inconsequential ornamentation in the form of an original design of public domain typefaces and fonts. This state of affairs has the capacity for considerable mischief and serious loss not only to publishers of text matter but also to the public in general and certainly to the reading public, and all without really compensating societal good.

In a recent (1972) comprehensively researched and closely reasoned paper on "The Copyrightability of Typography and Regulation 202.1(a)" by Harriet L. Oler, Attorney for Examining in the Copyright Office, and in which Ms. Oler concluded that "mere variations of typographic ornamentation, lettering or coloring" should continue to be denied registration under 17 USC, she also pertinently stated, inter alia, "The trouble stems from the fact that granting statutory copyright protection would fly in the face of traditional standards as to requisite amounts of copyrightable authorship for work of art and from the fact that statutory protection might practically restrict the public's free use of public domain information when printed in a protected font."

Words are the raiment of thoughts, and typefaces and fonts are but the raiment of words, at least that is so in respect of verbal communication and of typefaces and fonts designed to be read. It is the possible copyrighting of such alphabetical, public domain typefaces and fonts, even though they have some original ornamentation that gives our client (and those similarly situated as book and magazine publishers) pause and concern. Parenthetically, such ornamentation will perforce be minuscule by virtue of the self-limiting nature of readability, and such ornamentation will most likely be detectable and distinguishable only by those expert in the art. There is the real and substantial fear of implication in infringement actions that is the basis of this concern. Such apprehension can have a significant "chilling effect" upon the publishing of literary works, with the consequent depressing of activity in that field. If the occupational risks of such publishing be thereby increased, the economic attractiveness and support of that endeavor diminish. This diminution can adversely affect authors of such works by shrinking the market for their writings.

The foregoing potential dangers greatly outweigh, I am convinced, the benefits that might accrue to designers of original typefaces and to the manufacturers of such typefaces and fonts thereof, were such typefaces or fonts to become protectible under Titles I or II of H.R. 2223.

As of course, this Subcommittee well knows, under our constitutional Republic, we have placed a high premium on the free flow of ideas, on the freedom of expression and of the press. As I suggested above, were the typefaces and fonts which we have been discussing given copyright status, this flow of ideas would be impeded and the freedom of the press abridged by the threat of liability for copyright infringement that would hover over the publishing of printed literary material. (cf. *DeAcosta* v. *Brown*, 146 F 2d, 408, 413, dissent of L. Hand, J.)

In view of the foregoing, I urge that you not abridge press freedom or oppose the momentum of history by statutorily providing or otherwise indicating that "original" designs of readable typefaces or fonts constitute copyrightable subject matter.

Mr. DANIELSON. I yield to the gentleman from New York. Sometimes we get more down to the nitty-gritty in the questions and answers than we do in the open statement. Mr. Pattison.

Mr. PATTISON. I would just like to pass right now.

Mr. DANIELSON. Then I will take over for a minute or two, if I may.

You mentioned, Mr. Ebenstein, that you represent some independent manufacturers of type fonts. What is the contrast with an independent? What is a nonindependent? Define the term.

Mr. EBENSTEIN. As I have defined an independent manufacturer, it is one who does not also make the typesetting equipment as contrasted with Mergenthaler, for example, who makes typesetting equipment and makes fonts for their own machines.

Mr. DANIELSON. They make the fonts that are used in their typesetting equipment. You simply—within this subject matter, at least, you only manufacture the fonts. Is that the idea?

Mr. EBENSTEIN. That is correct.

Mr. DANIELSON. Are the type fonts, and I gather that big square thing there is a type font——

Mr. DEW. A grid, yes.

Mr. DANIELSON. It is one. There are others. Can the type font for a Mergenthaler machine be used in machines—machines of other manufacturers?

Mr. EBENSTEIN. Absolutely not.

Mr. DANIELSON. Can the fonts of other manufacturers be used in the Mergenthaler machine?

Mr. EBENSTEIN. Absolutely not.

Mr. DANIELSON. Is there some reason, patent law or otherwise, why you as a font manufacturer could not manufacture a font that would go into a Mergenthaler machine?

Mr. EBENSTEIN. Mergenthaler does have a patent which covers several of their pieces of typographic equipment. Mergenthaler also has a patent that covers a specific arrangement of type font which they use. Whether or not a type font could be made for a Mergenthaler machine that did not violate their patent rights, I don't know.

Mr. DANIELSON. Would it be—it would at least be a complex job to do so, is that it?

Mr. EBENSTEIN. I would think it would be a complex job to do so, yes sir.

Mr. DANIELSON. The independent manufacturers of type fonts, whom you represent, do not make type fonts that will go into the Mergenthaler machines.

Mr. EBENSTEIN. My client does not, no.

Mr. DANIELSON. Client, singular or plural?

Mr. EBENSTEIN. I represent a single client who is among this group. I know of no other that does either.

Mr. DANIELSON. I see. I am trying to be sure that I understand this, that a particular type font, the mechanical setup and the relative location of the different characters within that type font are unique in that one to the Mergenthaler machine, in another one to some other machine, and so forth. Is that correct?

Mr. EBENSTEIN. That is correct. In fact, in some cases the shapes are entirely different. Some are round, some are rectangular, some are square.

Mr. DANIELSON. So long as it is correct, I don't care what the shape is. I am thinking of whether or not compatibility—does the other gentleman confirm that?

Mr. WASSERSTROM. No compatibility.

Mr. DANIELSON. Again, you don't know, but that is not to say—incidentally, I might add, Mr. Mulliken, I thought you were the attorney for the second witness. I see I am wrong.

Our Chairman is back. Mr. Chairman, we have Mr. Ebenstein, Mr. Dew, and Mr. Wasserstrom, all of whom have testified. Mr. Mulliken is the second gentleman from the left as you face them. He represents the International Typographic Association and he has not testified. I don't wish to pass——

Mr. MULLIKEN. Mr. Dew is testifying for both of us.

Mr. DANIELSON. Your testimony is included in Mr. Dew's?

Mr. MULLIKEN. Yes.

Mr. DANIELSON. Very well. Then I think—to continue my questions, if I understand this correctly, if Company A manufactures a typesetting machine and also manufactures the type font to go into it, no other type-font manufacturer can produce a—can manufacture a type font which will go into that same machine and be usable in that same machine.

Mr. EBENSTEIN. Well, that is not entirely true. Separate from protection of the patent laws, any independent manufacturer could make a font for one of the machine manufacturer's pieces of equipment. I think the point is that the pieces of—the fonts that each of the man-

ufacturers make for their own equipment do not fit the equipment of other manufacturers.

Mr. Danielson. All right. I am glad you explained that. I think I have you now. It is—there is no legal barrier to Company X manufacturing a font that will go into the machine of Company A, but the fonts of Company A won't fit any other machine, so that the person who buys a font of Company A very nearly has to use the machine of Company A.

Mr. Ebenstein. That is correct. The only legal barrier——

Mr. Danielson. And your point, then, was that if we granted a copyrightable, recognized a copyrightable property right in that typeface, and it is exclusively in this type of font, no one would have access to it except a printer who has that particular machine.

Mr. Ebenstein. That is correct.

Mr. Dew. Precisely.

Mr. Danielson. Thank you. I headed backward the first time.

My only question is within the printing market, how many potential users would be in the market for a particular typeface? You may have already answered that in the last question. Only those printers who own that company's typesetting machine or who have possession of it.

Mr. Eberstein. That is true. I think there are approximately 1,600 independent typographers in the United States. There are approximately four or five or six major machine manufacturers. How that divides up as to how many manufacturers' equipment is in which, I really don't know.

Mr. Danielson. But if you got A, B, C, D, E, F, and G machine manufacturers, only the typesetters who have the machine of Company A can use Company A's type fonts and the same applies to the others.

Mr. Ebenstein. That would be the problem.

Mr. Danielson. You would have a restricted market in that it is restricted to the typesetters who have that manufacturer's typesetting machine.

Mr. Ebenstein. That is correct, sir.

Mr. Danielson. I am satisfied with my questions here.

Mr. Kastenmeier [now presiding]. The gentleman from New York. Any questions?

Mr. Pattison. I take it what you make are fonts for machines other than Mergenthaler machines?

Mr. Ebenstein. That is correct.

Mr. Pattison. All other machines.

Mr. Ebenstein. No. We make fonts for only the Alpha typesetting machines manufactured by Alphatype Corp. of Skokie, Ill.

Mr. Pattison. And the reason you do that is because there is no patent protection for Alpha, apparently, for that particular font.

Mr. Ebenstein. There is no patent protection for that particular font. There are many other fonts for which there is no other patent protection. It is a matter of my client's size and scope of activity. I think Mergenthaler is the exception in the industry in which they have a patent which covers the font which they sell.

Mr. Pattison. Generally speaking, the machine that makes the—the printing machine company that makes their own fonts also and you compete with them.

Mr. EBENSTEIN. Yes. We compete with Alphatype in the sale of fonts for their machines. That is correct.

Mr. PATTISON. And they design their own type and put out different fonts?

Mr. EBENSTEIN. That is correct.

Mr. PATTISON. Do you design your own type or do you use existing—one of the 10,000?

Mr. EBENSTEIN. Well, we do both. We sell fonts both for the Alphatype machine which are similar to the fonts that Alphatype sells. We sell fonts in the same type styles in different sizes. We also sell a number of typefaces which are of our own manufacture and of our own design, and I might add that those that we sell of our own design Alphatype has duplicated, so we are competitors right down the line.

Mr. PATTISON. If you manufacture a font for sale to people who own Alphatype machines and somebody takes your font and—how easy or how difficult is it to duplicate the font?

Mr. EBENSTEIN. It is a difficult process to duplicate a font well. It is a photographic process, but the problems involved require very careful alignment and it is not a simple process and there are very few independent manufacturers. I think primarily for that reason.

Mr. PATTISON. How do the people who design typefaces—that is all they do. I take there are some people who do just that. We heard this this morning.

Mr. EBENSTEIN. Well, I would venture to say there probably aren't more than 15 or 20 people in the world who do nothing but design typefaces.

Mr. PATTISON. Do they normally work for Mergenthaler?

Mr. EBENSTEIN. Yes.

Mr. PATTISON. They are employees?

Mr. EBENSTEIN. They don't work for Mergenthaler as an employee, but every major designer is tied in one way or another to one or two of the four or five major manufacturers for whom they have done work over a period of time.

Mr. PATTISON. I have no further questions.

Mr. KASTENMEIER. Do I understand you, gentlemen of the panel, to say that as far as H.R. 2223 is concerned, you prefer it in its present form for you do not feel it includes, subject to the suit that is pending, that it would force you to honor registrations or would otherwise provide for copyright protection for typefaces? Is that your position?

Mr. WASSERSTROM. I think, Congressman Kastenmeier——

Mr. KASTENMEIER. With respect to the bill before this committee.

Mr. WASSERSTROM. You weren't here when I spoke. I represent publishers and I am interested in—my concern is with the typography of publishing. In my own view, the present bill either does not entitle original typeface designs to copyright status either under title I or title II as presently worded, and my submission was that you should not modify or effect changes to permit the copyrightability of this kind of readable typeface. And I also suggested very strongly that you not open the door of copyrightability in any report that you may issue on this bill.

So, speaking for myself and my client, and publishers in general, I believe I am speaking properly for them, that I think we would be satisfied with the bill in its present form.

Mr. KASTENMEIER. While you quote, as I understand it—you cite Mr. Irwin Karp and Mr. Alan Latman as believing the present copyright law does not include protection for typeface designs.

Mr. WASSERSTROM. When I testified, Mr. Kastenmeier——

Mr. KASTENMEIER. I was going to say did not someone state that?

Mr. WASSERSTROM. I testified at the hearings at the Copyright Office, and so did Mr. Ebenstein, for that matter.

Mr. KASTENMEIER. Mr. Ebenstein, I believe, made the citation.

Mr. WASSERSTROM. I didn't cite it.

Mr. EBENSTEIN. I believe at the hearings before the Copyright Office, both Mr. Karp on behalf of the Author's League and Mr. Latman testified that it is not covered under current law.

Mr. KASTENMEIER. That is not to say that they do not prefer their coverage.

Mr. EBENSTEIN. No.

Mr. WASSERSTROM. Mr. Kastenmeier, Mr. Karp, who testified right after I did, was of the same view that I was and that is that the Register should not change the existing registration to permit this kind of typeface even when original in a copyright sense to enter the house of copyrights, so to speak, by the registration route.

Mr. EBENSTEIN. I can't speak for either Mr. Karp or Mr. Latman, but I read their testimony before the Copyright Office to go well beyond that. In the comments made in the letter from the Copyright Office to the committee, there was a quotation from Mr. Karp. I think the committee, if interested, should review Mr. Karp's complete testimony and Mr. Latman's testimony and I believe that their positions, although I can't speak for them, of course, it sounded to me like they went beyond merely whether it is protected or not protected under present law, but which should be——

Mr. KASTENMEIER. But as a matter of policy also shouldn't be protected.

Mr. EBENSTEIN. I believe that to be their testimony. Again I can't speak for them. I would be glad to provide the committee with a copy of the transcript of those hearings that were conducted before the Copyright Office and I will do that by mail if that is acceptable, if the committee is interested.

Mr. KASTENMEIER. Of course, Mr. Latman is here or could in a subsequent communication to this committee amplify his own point of view on that subject.

In any event, if there are no further questions, on behalf of the committee, I would like to express our gratitude to you gentlemen for——

Mr. DANIELSON. Mr. Chairman, may I ask one additional question about type fonts, please?

Within a type font, for instance, take that large one there that is about 7 by 9 or something like that, the various characters within—could you hold it up, Mr. Dew?

Mr. DEW. Certainly.

Mr. DANIELSON. Oh, yes. There are a number of panels, about 12 panels within that 1 framework, and within each panel there are about—there are a number of characters.

Mr. DEW. Characters, upper case, lower case, additional characters.

Mr. DANIELSON. Is the physical location of those characters on the

plate or glass or film, whatever that is, is that critical in the use of the typesetting machine?

Mr. DEW. Yes.

Mr. EBENSTEIN. Yes, it is. A typesetting machine is set up to move that font to a certain position and then expose——

Mr. DANIELSON. Light will pass through the character.

Mr. EBENSTEIN. That is correct.

Mr. DANIELSON. And therefore there must be a very close tolerance on the manufacture of the font in coordination with the mechanism so that when hit "M" you get "M," for example.

Mr. EBENSTEIN. That is correct, sir.

Mr. DANIELSON. Thank you. I wasn't sure of that.

Mr. KASTENMEIER. Thank you for your testimony.

[Subsequently, the subcommittee received the following letters from American Institute of Graphic Arts; Michael Parker of Mergenthaler Linotype, Howard B. Rockman and Luis Tomas Estrada.]

THE AMERICAN INSTITUTE OF GRAPHIC ARTS,
New York, N.Y., July 14, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Judiciary Committee, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: The American Institute of Graphic Arts is concerned with the balance of information that will be obtained from your committee's hearings on typeface design protection. My constituency, some 1840 professionals working in graphic communication, are what might be called "our country's typeface consumers". Our designers are the ones who actually create books and all kinds of printed and graphic material with type as a vital creative communications tool.

On June 24th I spoke on the telephone with your counsel, Mr. Herbert Fuchs who informed me that the testimony time that is to be available at your hearings had already been allotted.

Last January AIGA held a special meeting on this subject at which Ms. Barbara Ringer and others participated. Out of that was drawn up an informal statement of position. On advice from New York Congressman Edward I. Koch, we take the liberty of sending to you the enclosed 30 copies of the statement for distribution to your committee and for the record.

If there is further information or testimony required, please telephone me at (212) 758-2853.

Sincerely,

KARL FINK, *President.*

STATEMENT OF POSITION, TYPE FACE DESIGN PROTECTION, THE AMERICAN INSTITUTE OF GRAPHIC ARTS

The American Institute of Graphic Arts numbers among its 1700 members both typeface designers and typographic consumers—graphic designers and graphics production people who design with and specify typography. In the current controversy over type design protection, the Institute has two concerns:

1. To exercise its influence and offer help to seek a solution which will, insofar as possible, serve the needs of the graphic arts professions.

2. To help create a climate in which type designers can work both creatively and with adequate recompense and in which graphic designers can be free to select typefaces on the basis of appropriateness and aesthetic considerations without fear of legal entanglement.

AIGA is composed largely of creative people working in graphic communication, publishing, advertising, promotion, signage and other manifestations of visible language—a broad representation of the users of typography.

To us, type is a vital part of the communications process. It is a means of creative expression. In our opinion, the outcome of current discussions will be an important factor in determining the future visual quality of American communication. It will most assuredly influence the future of typographic design in this country. It can help create conditions that nurture and support creativity or conditions that stifle creative thinking, experiment, and innovation.

Most of us in AIGA know a great deal about type and its uses and little about legislation and its enforcement. Accordingly, in stating our views on the matter of type design protection, we will stick to our own area of expertise. We will state our needs, express our opinions on what is best in the way of a climate for producing good work, voice our concern, point to pitfalls, and mention moves we believe would be detrimental. We make no recommendations as to what legislation or other governmental action will best achieve our goals.

However, we will, if asked, supply information and advice to legislators and Copyright Office personnel, will work with them in developing a system that satisfies the needs of graphic designers; we will lend our support to rulings or legislation which are consistent with those needs.

A typeface is a unique creative work which merits government protection against unauthorized copying. It is as deserving of such protection as a novel, a poem, a song, or a drawing. After examining the options, we think that it can fall within the purview of amended Copyright Office regulations. But we prefer to state conditions and let others decide how best to do it:

1. We would like to see universal licensing of typefaces to all legitimate manufacturers. We consider it healthy to have typefaces obtainable from more than one source, provided there is good quality control. Because typeface designs are unique, they must be meticulously and accurately reproduced. Their extension to matrices or grids for equipment other than that for which they were originally designed is to be carefully controlled by the original designer or design team. Only with this kind of quality control, which ensures compatibility, can designers specify type with the assurance that their finished designs will reflect their graphic plans.

2. Because typefaces are designated—and selected—by name, AIGA feels that any copyright or design protection system must cover both design and name. AIGA welcomes licensing of type designs among a number of marketers. However, for the protection of users of type, we believe that the name for a typeface must be recognizable and that the configuration of the type to which the name is assigned must be constant. Name and design should not be separable.

3. We are told that a possible effect of a change in Copyright Office regulations—albeit a remote one—might be that an injunction could be obtained against printing of a book because the type in which it is set is of questionable origin—an unauthorized copy of a protected face. The author, publisher and printer would thereby become victims and suffer financial loss in a dispute between marketers of type fonts. We also understand that specific legislation could preclude such a circumstance.

Should typefaces become copyrightable, we feel there exists a temporary solution to this problem: book manufacturers could simply limit their designers and printers to use of typefaces in the public domain—all faces that were standard prior to a change in regulations—until any danger of disruption of production schedules is eliminated by legislation.

4. AIGA wants to be certain that the costs of type composition remain reasonable—that a royalty and licensing system will not inflate rates unfairly; it also wants to be sure that any royalty or license charge will be collected only once, when the font or grid is sold. Moreover, we would oppose any change which placed restrictions for use of composed letters on the graphic designer, who must be free to alter or adapt as special graphic needs dictate.

5. There are obvious problems in determining whether a specific typeface is, in fact, sufficiently original to merit granting of a copyright or in determining whether a typeface is sufficiently like another to constitute an infringement of copyright. The differences which distinguish one typeface from another are often subtle or minute; they might well seem insignificant to the layman. Yet these differences often prompt a designer to specify one face and reject another that seems almost the same.

To overcome this difficulty, and to minimize the amount of litigation that will inevitably result from copyrighting of typefaces, AIGA recommends formation of an advisory group of typeface experts—specialists who understand the significance, or lack of significance, of differences in letter forms. This typographic panel could have several functions:

a. To serve as an advisory group to the U.S. Copyright Office and to legislators in promulgating effective typographic design protection laws and regulations.

b. To help establish criteria of originality (not aesthetic value) by which copyrightability or protectability of typefaces can be determined on a regular basis.

c. To clarify, mediate, or arbitrate disputes involving typeface designs. To serve as experts in mediation, arbitration, or litigation.

We believe that an effective system of type design protection will foster more and better type design in this country. Arguments to the contrary seem to stem

from fear and from the automatic tendency of business to resist assignment of additional powers to government bureaus. While the process of protection will require study and periodic refinement, we believe it will turn some fine American designers toward a challenging area in which they have not been able to afford to work of recent years. This will almost automatically follow when type designers are paid for their effort in proportion to the success of their product.

LAFF, WHITESEL & ROCKMAN,
ATTORNEYS AT LAW,
Chicago, Ill., August 29, 1975.

Re H.R. 2223, title II, copyright protection for original typeface designs.

Hon. ROBERT W. KASTENMEIER,
Chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR SIR: Please find enclosed my comments in opposition to the proposed change to Copyright Regulation 202.1(a), which are being filed on behalf of Castcraft Industries, Inc., of Chicago, Ill.

Cordially,

HOWARD B. ROCKMAN.

Enclosure.

STATEMENT OF POSITION ON COPYRIGHTABILITY OF TYPEFACE AND TYPE FONT DESIGN, HOWARD B. ROCKMAN—LAFF, WHITESEL & ROCKMAN ON BEHALF OF CASTCRAFT INDUSTRIES, INC.

I. Introduction

This memorandum is being filed in opposition to the proposed action by the Register of Copyrights in changing regulation § 202.1(a) to permit the registration of ordinary typeface and type from designs and fonts. This action would, in effect, extend copyright protection to works which are not within the category of copyrightable subject matter as defined by legislative and judicial mandate.

Opposition to the proposed change is based on several grounds. First, the proposed change would radically alter existing law as to the scope of copyrightable subject matter, and in particular, as to the standards for delineating a "work of art". Such changes are outside the power of the Register of Copyrights, which office is neither legislative nor judicial in nature. Second, the decision whether the law should be changed, and how, should be decided by the courts, or Congress, before the Copyright Office makes such an important change. This has been the custom of past rule changes, and this policy should not be abandoned now.

Third, present design patent statutes, and the procedures implemented thereunder, are sufficient to grant protection to those type forms exhibiting the requisite creative authorship required under the Copyright Laws. The Copyright Office would face tremendous difficulty examining originality and creative authorship in typefaces, since the requirements of such examination are beyond the capability of the Copyright Office as presently staffed.

Fourth, if the regulation were changed, publishers would avoid the use of new typefaces when producing public domain works to prevent contingent liability, thus stifling the demand for new typeface designs.

Fifth, the effect on the total industry affected by the rule change would be adverse. Machinery manufacturers would be able to dominate and to exact tribute from the many typographers who buy and use such machinery. Thus, the proposed change is deemed by this writer to be unnecessary, unwarranted, and ill-advised.

II. Under Existing Law, Typeface Designs Cannot Qualify as Copyrightable Works of Art

At the Copyright Office hearing on November 6, 1974, proponents of the proposed change in rule 202.1(a) to allow registration of new designs in typefaces and fonts urged that such typographic designs qualify as "works of art" in Class G (17 U.S.C. § 5(g)). However, typeface and font designs do *not* meet existing legal standards for determining copyrightable works of art, and if the proposed rule change were adopted, a change in substantive copyright law would be required, as well as procedural changes. The Register of Copyrights, as an administrative officer of a legislative agency, is not empowered to adopt rules contrary to statutory and judicially pronounced law.

The Copyright Statute, 17 U.S.C. § 5(g), states only that "works of art" are subject to registration, but does not indicate the standards to be applied in deter-

mining what constitutes a "work of art". However, several judicial decisions have attempted to establish a definable standard, and the Register of Copyrights, under the authority of 17 U.S.C. § 207, has promulgated rules establishing the criteria for registerability of works of art. When court decisions have altered extant guidelines for determining the copyrightability of a work of art, the Register of Copyrights has responded by changing the rules.

To be copyrightable in Class G, a work must be the original work of the author, and if the work is based on material already in the public domain, his contribution to the total work must be substantial, and something more than merely trivial. *M.M. Business Forms* v. *Uarco*, 472 F.2d 1137 (6th Cir. 1973); *Alfred Bell & Co.* v. *Catalda Fine Arts*, 191 F.2d 99 (2nd Cir. 1951). The alphabet has been in the public domain for quite some time. Therefore, to be copyrightable as works of art, typefaces or fonts must exhibit a design change which is more than merely trivial. Since legibility and readability are the primary considerations in letterform design, the changes made to each letter are merely trivial embellishments on a basic form, and hardly raise the letter to the status of a work of art. Thus, "mere variations of typographic ornamentation" do not meet the originality qualification for a work of art, and the regulation should not be changed.

Other than originality, a copyrightable work of art must exhibit "creative authorship". 37 CFR § 202.10(b). This requirement is applied not as a matter of policy, but as a matter of definition of a work of art. *Gardenia Flowers, Inc.* v. *Joseph Markovits, Inc.*, 280 F. Supp. 776 (S.D.N.Y. 1968). As testified to by typeform designers at the November 6, 1974 hearing, one typeface varies from another by the addition of known elements, such as serifs, or by merely thickening or thinning lines, curves and spaces. There is little, if any, creative effort exhibited in altering one typeface to make it "new", since above all, the letters must be legible. Thus, without embodying creativity, typeforms do not meet the historical and ordinary standards of an "art", and should not be registered as such. See: *Rosenthal et al.* v. *Stein et al.*, 205 F.2d 633 (9th Cir. 1953).

The value of a literary work or a work of art is in the artists' expression of the ideas embodied therein. The sales value of these works is in the literary or artistic quality of the expression. In literary works, royalties are paid to the author, or composer, or published. In works of art, royalties are paid to the artist. People usually, however, do not buy literary works because of the particular typeface used. Therefore, the artistic quality of the typeface is at a very minimal level compared to the functional quality of the typeface in being legible in expressing an idea.

Proponents of a change in the existing regulation barring registration of "mere variations of typographic ornamentation" have urged that the Copyright Office employ a typography "expert" to determine originality,[1] e.g. whether a submitted typeface is truly different from the approximately 80,000 typefaces presently in the public domain. Aside from the technical and practical problems this procedure would spawn, to establish such a procedure would require the Copyright Office to apply a standard of copyrightability which is contrary to the body of relevant, substantive law. In my judgment, the Register of Copyrights is without power to establish a new standard of registerability without legislative backing, and in particular, in view of existing law to the contrary.

In *Gardenia Flowers, Inc.* v. *Joseph Markovits, Inc.*, the District Court for the Southern District of New York held that the "originality" of a work of art is not to be determined by the opinion or observation of an "expert". Instead, the court found that originality was to be determined "by the eye of an ordinary observer". (280 F. Supp. at 783). I submit that this case, while decided at the District Court level, has not been reversed or criticized in subsequent decisions, and represents an accurate statement of the prevailing law. Thus, were the Copyright Office to use an expert to determine the registerability of typefaces, a standard contrary to existing law would be introduced. This, I submit, is an abuse of the rule-making discretion of the Register of Copyrights under 17 U.S.C. § 207.

Further evidence of the lack of "creative authorship" in the production of typeform design is the fact that optical projectors and printers are available which can alter a given typeface design by purely mechanical means, i.e. rotating a series of lenses relative to one another. One manufacturer advertises that its machine can produce approximately eleven million typeface variations through optics.

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[1] Comment of Henry Leeds, representing Mergenthaler Linotype Co. Hearing of November 6, 1974.

The present Register has stated that the proposed change in the Copyright Office regulations would merely reflect an interpretation of the law. However, the proposed change in the rule regarding typeforms would result in an interpretation that is contrary to prevailing law. Further, this action would enlarge the area of copyrightability, which is not within the power of the Register of Copyrights. The proposed rule change, therefore, is unsound. As in the past, the present Register should be obliged to adhere to established judicial standards relating to the scope of copyrightable subject matter when considering changes in administrative regulations.

III. Mechanical and Utilitarian Aspects Dictate the Form of Typefaces, and Not Their Artistic Craftsmanship

The Copyright Office has consistently held that where the shape or form of a work is dictated primarily by utilitarian or functional considerations, rather than aesthetic values, the work does not qualify as a "work of art" within the meaning of 17 U.S.C. § 5(g). Where a work combines both utilitarian and aesthetic values, the Office has allowed registration on the separable art embodied in the work, apart from the functional features. This concept is embodied in Rule 202.10(c) of the Copyright Office, 37 C.F.R. § 202.10(c), which states that artistic features of a work "which can be identified separately and are capable of existing independently as a work of art" are eligible for registration.

The key question is whether additions to or embellishments on standard letterforms can be "identified separately" and exist "independently" to qualify as works of art. I have concluded that they are not!

Type characters are instruments or devices for communicating written language, and are utilitarian objects. Even "decorative" or "unusual" letters must retain their ability to be read. Thus, the main thrust of typeface design is legibility. The artistic additions to a letter must stay within narrow confines, or the letter loses all legibility and becomes worthless. As stated by Mr. Michael Parker, Director of Typographic Development at Mergenthaler Linotype Co., during a seminar held in Washington, D.C. on October 15, 16, 1974, when enough ornamentation is added to a typeface to make it "novel," the face also becomes illegible. This supports the theory that any design change to a standard letter which allows the letter to retain its legibility can only be considered "trivial," and therefore not copyrightable.

The mechanical aspects of printing also dictate to a large extent the design of a particular typeform. These considerations are:

a. avoiding ink traps and blurs;

b. maintaining proper spacing between large ink masses;

c. line thickness when ink is applied;

d. the unitizing and mathematical pattern of widths when the letters are assembled into words;

e. cathode ray tube display requirements; and

f. mechanical modifications.

With these limits on the artistic freedom of a type designer in producing a new face, there is little room for the degree of "creative authorship" required to constitute artistic craftsmanship separate and independent from a letterform's utility in conveying information.

Ordinary typefaces, standing alone or assembled in groups to form words, are not objects of aesthetic appeal. Their only purpose is to be read, and if their form is pleasing then reading them is made less tiring. Letters, particularly those used in texts, have no life apart from their function, and thus are not works of art.

The present Register, in 1954, was instrumental in the adoption by the Copyright Office of rules which embody the above-stated concept. "The Copyright Office Practices of October, 1954, Part IV," (formulated by Ms. Barbara Ringer) states:

". . . if the shape of an article is dictated by or necessarily responsive to the requirements of its utilitarian function, its shape cannot qualify as a work of art."

It is difficult to understand how a typeface design could meet this requirement! This concept was embodied in the Copyright Office Regulations published in 1956 and 1959, and approved by the Second Circuit in *Kitchens of Sara Lee, Inc.* v. *Nifty Foods Corp.*, 266 F.2d 541 (2nd Cir. 1959).

Because of its primary utilitarian function, a typeface would qualify as a work of art under Copyright Office Regulation 202.10 if it contained more than a minimum amount of originality and separable artistic authorship, and if its

shape were not dictated primarily by its function. This category does not embrace commercial typefaces, which above all else must be functionally legible. Aesthetic value is secondary.

As stated previously, the test of creative authorship of a work based on a public domain work is the aesthetic value as seen by a casual observer. Witnesses testifying before the Copyright Office officials on November 6, 1974 repeatedly stated that while the layman cannot detect the differences between typeface designs, the differences are apparent to an expert. They even suggested that the examination of typeface designs for authorship be conducted by an expert. If it takes an expert to note these differences, then only small changes exist between new and old typeforms. These small or "trivial" differences cannot raise a utilitarian object such as a letter of the alphabet to the status of "art."

A curious dilemma would arise if new typeface designs were to be registered. The case of *Ted Arnold Ltd.* v. *Silvercraft Co.*, 259 F. Supp. 733 (S.D.N.Y. 1966) indicates that where a design for a utilitarian object is granted registration, only those features of the work which can be identified separately and are capable of existing independently as a work of art are covered by the registration. In that case, a telephone casing enclosure was considered to be separate from a pencil sharpener.

In the case of typefaces, whose sole utility is to convey information, inside every ornamental or newly designed letter "A" is a public domain letter "A." In other words, the new design is built on the existing letter. Therefore, what does the registration cover—the entire letter, or just that portion of the letter which has been added or modified by the designer? These questions will have to be answered by typographers when instructed by an art director to use a protected typeface, or the equivalent thereof.

IV. *The register of copyrights does not have the power to register typeface designs*

A. THERE IS NO NEED FOR A CHANGE IN THE REGULATIONS

The announcement of the Copyright Office's consideration of a proposed rule change appearing in the Federal Register, Vol. 39, No. 176, September 10, 1974 stated that developments in the industry, judicial developments, and the conclusion of the Vienna Conference (WIPO) in 1973 provided the impetus for the present amendatory proceedings. However, none of the factors underlying these three categories of development support the need for a rule change.

1. Industry Developments Do Not Warrant a Change

Those supporting a rule change urge that without copyright protection, designers of typefaces do not have the incentive to produce new works, thereby stifling creativity in the development of new letterforms. One speaker at the seminar conducted on October 15, 16, 1974 went so far as to describe the plight of a poor typeface designer who existed on the brink of financial disaster because of his inability to protect his work under the Copyright Laws.

I suggest, however, that this is not the "industry development" which has led leading typographic machinery manufacturers to their recent quest for the protective copyright umbrella. Until recently, the manufacture of type fonts was predominately accomplished by the casting of metals, such as lead. Because of the difficulty in producing a new typeface in lead, there was very little need, if any to seek protection for the "intellectual" expression embodied in the typeform. Therefore, from a business point of view, and not because of any legal or aesthetic criteria, these large manufacturers made no effort to change the Copyright Law.

However, in recent years, the advent of new photo-typesetting processes and devices makes it relatively simple to duplicate a letter, or series of letters, of the alphabet. Thus, a user of a photo-typesetting machine is able to purchase his font of alphabets from suppliers other than the machine manufacturer. Since this business situation cuts into the profit picture of the large companies, they set about to seek a method to prevent their fonts from being copied. The only way to accomplish this was to reverse a policy of the Copyright Laws which has stood for over eighty years. It is interesting to note that the majority of the typeface designers who spoke either at the October 15, 16, 1974 seminar, or at the November 6, 1974 hearing were, in one way or another, monetarily connected with a manufacturer or manufacturers of typesetting machinery. However, a

change in a business situation does not raise typeface design to the status of "art."

Thus, the "industry" *now* feels the economic pinch of free and open competition where it once enjoyed a technical monopoly, and is looking to the Copyright Office to give them back their monopoly. This, I suggest, is contrary to our competitive economic system. As will be discussed in a later portion of this paper, by giving the large manufacturers the monopoly they want, the competitive fabric of the typography industry as a whole, which is composed of many small typography shops throughout the country, will be cast out of balance to the great economic detriment of the operators of these small establishments.

2. No Judicial Decision Suggests That the Law, as Embodied in the Copyright Office Regulations, Has Changed

The decision by the District Court for the Eastern District of Pennsylvania in *Amplex Mfg. Co. v. A.B.C. Plastic Fabricators, Inc.*, 184 F. Supp. 285 (E.D. Pa. 1960) has been mentioned by some to indicate that there is a judicial trend towards recognizing the copyrightability of typeface designs. This is not true, however.

In that case, the court held that plaintiff's arrangements of standard lettering to form words in its brochure, and the manner of presentation was copyrightable. This is what is generally known as typography (layout or arrangement of words, sentences, phrases, etc.) as contrasted to a typeface (a single letter), or a font (the alphabet arranged in a reproducible platen). The court in *Amplex* did not hold that the typeface designs making up plaintiff's arrangement of words were copyrightable. As a matter of fact, the court noted that the lettering used by plaintiff was Egyptian and Egyptian Modified, two common, public domain typeface designs.

The *Amplex* court also relied upon the illustrations of products in the plaintiff's brochures to find independent authorship. This is relevant when this case is analyzed in view of a later decision of the same court, *Surgical Supply Service, Inc.* v. *Adler*, 206 F. Supp. 564 (E.D. Pa. 1962), rev'd on other grounds, 321 F.2d 536 (3rd Cir. 1963), where copyrights in price lists were held invalid for lack of the minimum degree of artistic or literary merit. This decision suggests that the *Amplex* decision rests more on the copyrightability of the product illustrations, rather than on the arrangement of typography.

No cases have been decided which squarely hold that type forms or fonts are or are not works of art under 17 U.S.C. § 5(g). However, several cases have, in *dicta*, supported the present Copyright Office regulation prohibiting registration of "mere variations of typographic ornamentation", and in so doing, have established that this regulation, while it:

". . . does not have the force of statute, it is a fair summary of the law."

See: *Kitchens of Sara Lee, Inc.* v. *Nifty Foods Corp.*, 266 F.2d 541, 544 (2nd Cir. 1959); *Alberto-Culver Co.* v. *Andrea Dumon, Inc.*, 466 F.2d 705, 710, 711 (7th Cir. 1972).

Thus, the present regulation is a fair statement of what the Congress and the Courts intended to be covered as "works of art" under the Copyright Law. The absence of any legislative or judicial determination to the contrary, especially during extensive revisions of the Copyright Law which have been pending in Congress for about twenty years, supports the view that the law, as presently interpreted by Regulation 202.1(a) is sound.

3. The Proposals of the Vienna Convention of 1973 Do Not Require a Change in Our Copyright Laws

Article 7, paragraph (1) of the WIPO proposal arising out of the 1973 Vienna Convention[2] suggests that typefaces be protected if they are novel, original, or both. Paragraph (2) states:

"The novelty and the originality of typefaces should be determined in relation to their style or overall appearance, having regard, if necessary, to the criteria recognized by the competent professional circles."

This coincides with the comment by Mr. Leeds at the November 6, 1974 hearing that if the Copyright Office is to register type designs as works of art, an expert or experts must be hired to differentiate submitted faces with those already in the public domain.

[2] The United States was not officially represented at the Vienna Convention, nor was it a signatory to the draft treaty. This Convention, which was attended mainly by European countries, focused primarily on the protection of cartels and monopolies indigenous to European economics. United States policy, however, is opposed to cartels and monopolies.

At present, the Copyright Office is not equipped with the personnel or finances to establish a novelty examining procedure. Whether it is worth setting up such procedures in the Copyright Office for only one class of works is highly debatable.

However, the staff of the Patent Office (now the Patent and Trademark Office) is trained and equipped to conduct the novelty and originality examination of typefaces. Designs for novel typefaces and fonts have been submitted to the Patent Office in the past, and design patents have issued thereon following a determination of novelty. Since all typefaces are primarily functional in that their purpose is to convey information, the test of novelty similar to that applied under the patent laws should be applied to any system of protection afforded to variations in typeface design. The design patent statute and the examination procedures already established in the Patent Office are the proper forum for applying these tests. The Copyright Office is not equipped to handle novelty examinations, and were it to do so, such action would be contrary to existing substantive law regarding the registrability of works of art.

I strongly suggest that a novelty examination of typeface designs is necessary to prevent removing extant designs from the public domain. Currently, there are several thousand public domain typefaces available to any art director or typographer. Since it is common practice for typeface designers to base their new designs on existing public domain letter faces, it becomes important to distinguish between new and old. Thus, the WIPO proposal may be implemented within the structure of our existing Design Patent Laws and examining procedures. There is no need to radically amend Copyright procedures to provide the same result.

B. NORMAL PROCEDURE OF THE COPYRIGHT OFFICE HAS BEEN TO AMEND A REGULATION RESPONSIVE TO A COURT DECISION OR LEGISLATIVE ACTION

The present Copyright Act, 17 U.S.C. § 1 et seq. was enacted originally in 1909. Pursuant to the Act, the Register of Copyrights in 1910 promulgated a series of regulations, one of which excluded ornamental letters or forms of type from registration. This concept has continued as part of the regulations up to and including the present.

In 1956, the present wording of the significant part of Regulation 202.1(a) was adopted. This amendment was made in the wake of the decision by Judge Learned Hand of the Second Circuit in the case of *Ricordi* v. *Haendler*, 194 F.2d 914 (2nd Cir. 1952). In this case, the question was raised of the copyrightability of typography, but was not answered. Following the *Ricordi* decision, the Copyright Office in 1953 conducted a follow-up study, under the direction of W. Strauss, of the copyrightability of type fonts. This study concluded that some type designs could be copyrightable as works of art, but ordinary type and type arrangements have traditionally been denied protection by the courts and should not be granted registration. Strauss concluded that ordinary letters, either alone or in combination, are not objects of aesthetic appeal; they have no life apart from their function of forming words, and are not works of art.

This analysis leads to two important points. First, Strauss found in 1953, and it is true today, that courts have repeatedly expressed the feeling that type forms are not registrable under the Copyright Law. *Kitchens of Sara Lee, Inc.* v. *Nifty Foods Corp.*, 266 F.2d 541 (2nd Cir. 1959); *Alberto-Culver Co.* v. *Andrea Dumon, Inc.*, 466 F.2d 705, 710, 711 (7th Cir. 1972). The *Amplex* case does not establish a rule to the contrary. Therefore, there is no court ruling which demands or even suggests that the present rule excluding type forms from copyright protection is in error.

Second, the Copyright Office has consistently amended its rules, when necessary, in response to judicial or Congressional action. Here, however, the Register appears headed on a course of action at the behest only of those large manufacturers of typographic equipment which would greatly benefit by their newly found monopolistic power. The Register, by changing the rule now, will be acting without judicial or legislative impetus, and without waiting for a court decision stating whether the proposed rule is right or wrong. This is wholly contrary to established practice, and will work a great harm to the majority of the typography industry.

At present, there is a case pending in the Southern District of New York which squarely raises the question of copyrightability of typefaces. The case is captioned *Leonard Storch Enterprises, Inc.* v. *Alphatype Corp.*, Civil Action No. 74 Civ. 1765. In following the precedent of past Registers, the present Register

should wait until a resolution of the copyright issue is made in the *Storch* case before making a final determination on the proposed rule. Typefaces have been excluded from protection under the Copyright Law since its inception; waiting a short time for the Courts to decide the issue surely would not harm the scheme of things.

C. ENACTMENT OF THE PROPOSED RULE WOULD BE TANTAMOUNT TO THE EXERCISE OF LEGISLATIVE POWER BY THE REGISTER

The proposed rule on typefaces is more than merely procedural or interpretative in nature. As stated previously in this paper, the courts have repeatedly held that the present regulation is a fair statement of the law. The proposed rule would establish a whole new class of copyrightable subject matter, which is a legislative, and not an administrative decision. Therefore, on such an important and substantive matter as proposed here, Congress, in the absence of any judicial direction, should first consider the impact, wisdom, and need for any proposed change.

Curiously, the Copyright Revision Bills (S. 1361; H.R. 2512) have been before Congress for approximately twenty years, and at no time has anyone from the Copyright Office presented the issue of registration of typefaces for legislative consideration. Neither have any of the industry spokesmen who now clamor for change. I submit that the proper place to give full consideration to both sides of this issue is a Congressional hearing, not merely a one day hearing before Copyright Office officials. Maybe then the public will find out just why the dominant members of the industry, such as Mergenthaler and the International Typeface Corporation have not pushed for this change before Congress, and what they have to gain by their present efforts.

D. THE REGISTER'S DISCRETION IN RULE MAKING SHOULD NOT BE ABUSED

The power of the Register of Copyrights to make the proposed rule change is not that clear. What little legal authority is available indicates that the Register's power of acceptance or rejection of submitted works are in some degree discretionary, and not merely ministerial. *Bouve* v. *Twentieth Century-Fox Film Corp.*, 122 F.2d 51 (D.C. Cir. 1941). Although the Register's discretionary acts are not subject to appellate review by the Librarian of Congress, they are very clearly subject to judicial review and correction. *Bailie* v. *Fisher*, 258 F.2d 425 (D.C. Cir. 1958). The courts treat with great weight the actual practices of the Copyright Office. *Fred Fisher Music Co.* v. *M. Witmark & Sons*, 318 U.S. 643 (1943); *Mazer* v. *Stein*, 347 U.S. 201 (1954); *DeSylva* v. *Ballentine*, 351 U.S. 570 (1956).

Whatever discretionary powers the Register has, this power would be abused if the Register took action which would be contrary to established law, and which would result in rewarding a few with a monopolistic power which could be used adversely against an industry composed of many small business enterprises. Further, to establish procedures in the Copyright Office to determine copyrightability using erroneous legal standards would be a clear abuse of discretion.

E. THE "RULE OF DOUBT" FAVORS RETENTION OF THE EXISTING REGULATION

The Copyright Law, 17 U.S.C. § 5, enumerates classes of works subject to registration, but fails to establish standards for a work falling in a particular class. By enacting regulations such as contemplated here, the Register is expanding or narrowing the substantive scope of the law, without legislative or judicial guidance. As a result, the actions of the Register must be sound, and based on practical as well as legal principles. Action either way could force a proposed registrant or a user to resort to litigation to seek a declaration of his or her rights (mandamus v. infringement).

Therefore, the burden on the registrant must be weighed against the burden on the user. This is the proper manner in which the Copyright Office's "Rule of Doubt" should be applied, since both the courts, and the small typographers will, from past experience, accord *prima facie* validity to certificates of registration for typefaces.

In my opinion, application of the "Rule of Doubt" dictates that the proposed rule change *not* be enacted, leaving the present applicants to the courts to seek reversal of present Office policy and established legal precedent. The economic weight of the industry is in the hands of those favoring a rule change—the typographic machinery manufacturers. These are the same people who are now

seeking to register their type fonts. The cost of a legal test of their position can well be afforded by these applicants, as evidenced by the apparent amount of resources already expended in support of a rule change.

To the contrary, the users—the typographers, artists, studios, and advertising agencies as well as printers and publishers are individually least able to seek a court declaration that a copyright registration on a type font is invalid. Thus, if the rule were changed, the chances of a court case seeking clarification of this controversy is rather remote. Therefore, in balancing the practical and economic consequences of granting registrations for typefaces and fonts, the "Rule of Doubt" favors maintaining the status quo.

V. The Proposed Change to Regulation 202.1(a) Would Adversely Affect a Large Proportion of the Typography Industry

The foregoing statements conclude that the proposed change in Copyright Office Regulation 202.1(a) would be contrary to long established legal principals, would require an examination procedure which would severely strain the efficiency of the Copyright Office, and require the creation of a complicated disproportional review system for one small class of works submitted for registration. However, the Register's consideration of the proposed rule change cannot ignore the real economic impact such a change would have on those affected—the advertisers, publishers, text re-printers, font suppliers, and typographers. The Register recognized this herself when, at the conclusion of the November 6, 1974 hearing, she indicated that she must be "sensitive" to industry impact when considering this matter. I submit that the proposed rule change will place economic monopolistic power in the hands of a few, already dominant entities in the industry, will cause many small typographers additional and unaffordable expense, and will stifle, rather than create, a demand for new typeface designs.

A. THE STRUCTURE OF THE TYPOGRAPHY INDUSTRY

Dominant in the typography industry are several large manufacturers of typographic reproduction machines. These machines are sold to typographers for the production of printed material such as advertising proof pieces, and other printed works. The machinery produced by the large manufacturers are adapted to receive fonts which contain the letters, numerals, and punctuation marks of a particular type design. The fonts are interchangeable in the machines, whereby a single machine can produce a work product in any type style by merely selecting and inserting the proper font.

Present machines use photographic projection on photosensitive paper to produce a desired image. The fonts, or alphabets, comprise film strips or fiche which are interchangeably inserted in the projection path of the machine. Type fonts, in the form of film strips or fiche, are supplied to typographers by several manufacturers, including the machinery manufacturers themselves, and others who just reproduce and sell film and fiche fonts. Since the fonts are not copyrightable, the large manufacturers are prohibited from maintaining a monopolistic position on the supply of fonts to a typographer. Through the vehicle of competition, the price of a font to a typographer has remained reasonable.

This, apparently, has caused the large machinery manufacturers some concern, since they apparently feel that they can increase their profit margin by forcing typographers who purchase their machinery to also purchase all their fonts from the machinery supplier. It is clearly evident to this writer that the major force behind the present effort to change Regulation 202.1(a) comes from the large machinery manufacturing concerns, and not the allegedly deprived designers whom they establish as "straw men" at each seminar and hearing. When viewed from the vantage point of the entire industry, however, it can readily be seen that the economic disadvantage this rule change would cause clearly outweighs any economic benefit the manufacturers will derive from their monopoly.

The typographers who purchase and use the machinery produced by the large manufacturers comprise an industry made up of thousands of small shops throughout the country. These are predominantly small business enterprises, and are definitely smaller in economic power than the manufacturers of their equipment. Profit margins in a successful typography business usually amount to four per cent, or lower. Therefore, decreased cost savings are an important factor in maintaining a healthy industry. Obviously, if a typographer is forced to pay

noncompetitive prices for his fonts, he would face a substantial cost increase. Some typographers have asserted that the additional costs they would face would be prohibitive, and force them out of business.

To understand why, an understanding of the nature of a typographer's business is necessary. The typographer receives an order from the art director of an advertising agency, or an advertising department of a large company, to produce a proof piece of lettering for submittal to a client, for example. The art director has at his disposal a library of type styles and designs, and he chooses one of these styles and orders its reproduction from the typographer. The typographer must have access to that type style to provide proper, and immediate service to the art director. Today, this is a simple matter, for if the designated typeface is not in his shop, the typographer can obtain a font rather quickly, and at a competitive price, from a film or fiche font producer.

However, the proposed rule change will drastically impede the typographer's ability to provide prompt, low-cost service. Because of the visible presence of large typography machinery manufacturers in these efforts to change the rule, I anticipate that these manufacturers will obtain copyright protection on the fonts they consider "new", and will sell these fonts only to typographers who use their machinery. Since the rule-making power of the Register does not extend to forcing compulsory licensing of reproduction rights on their fonts by manufacturers, there is a strong possibility that this situation will be created. Thus, when an art director orders a particular typeface from the typographer, the typographer might not be able to obtain the font unless he has the copyright owner's machine in his shop. To be able to provide any typeface which an art director might order, the typographer would be required to install machines of each manufacturer in his shop, even though one machine duplicates the functions of the other. The absurdity of this situation is apparent.

Further, since the fonts will be protected if the rule is changed, the typographer will be unable to obtain the required font from a second source. Thus, the manufacturer may legally deny him access to a necessary tool of his trade, unless he purchases their machinery, or pays an exorbitant price. Without a secondary source, price competition will be eliminated, and the manufacturers can charge the typographer what they want.

Certain prevailing industry conditions indicate that the prices for copyrighted fonts will increase sharply. A corporation known as ITC, International Typeface Corporation, offers allegedly new typeface designs for sale to its "subscribers", who then in turn offer the fonts for sale to the typographers. The subscribers of ITC are the typographic machinery manufacturers, who pay practically a 100% royalty to ITC for the use of their "new" designs. The manufacturer, under direction of ITC, then passes this royalty cost on to the customer, the typographer. Therefore, at present, under a scheme obviously directed at obtaining protection outside the Copyright Law, fonts are being made available to typographers through ITC at about double their cost in normal trade channels. It is significant that ITC's "subscribers" include approximately 23 of the nation's predominant typographic machinery manufacturers. If this is how these companies operate under existing law, is there any doubt that they would exercise full monopolistic control over the typographers if the rule were changed? Significantly, representatives of ITC, together with representatives of Mergenthaler, are at the forefront of those supporting a change in the present law. Their presence predominates each seminar and hearing where the subject is discussed.

If the desires of the large manufacturers, such as Mergenthaler, and the typeface "promoters", such as ITC are acceded to by the Register of Copyrights, these large concerns will have the power to dominate an industry made up of many small typographers. The present actions of these would-be monopolists show without a shadow of doubt that their one goal is to add to their profit margins by gaining market control over the supply of type fonts used in their machines. Their arguments that the "designer" is the poor, deprived one under existing law is a complete fallacy. Note the practical absence of *independent* typeface designers opposing the present regulation at the recent hearing!

B. COPYRIGHTS FOR TYPEFACES WOULD POSE A SERIOUS THREAT TO THE RE-PRINTING INDUSTRY

At the November 6, 1974 hearing, James Silberman, Esq., addressed himself to the problems of the reprinting industry should the proposed regulation change be made. He pointed out how the rule change would adversely affect not only one industry, but also a segment of the purchasing public.

The reprinting industry reprints microfilmed works, out-of-date works, limited edition works and the like for the academic community and libraries. When a scholarly text is published, the first edition usually includes 200 to 500 copies. Years later, a library or teacher may have a need for the book, and the reprinter photographically reproduces the text for a cost of $13.00 to $15.00. Were the type to be reset, the cost would be $50.00. If a work is still protected by copyright, a royalty is paid to the author. However, most of the reprinted works are out-of-date prints whose literary content is in the public domain.

Were a public domain work printed in a typeface which was copyrighted, the reprinter could not photographically reproduce the work. The user would be forced to reset type and make the book at three to four times the cost of present methods. Thus, registrability of typefaces would destroy the microfilm and reprint industry.

More significantly, however, the registration of typefaces would have the practical effect of prohibiting the entry of literary works into the public domain after the statutory 56 year period lapses, if the work is printed in an unexpired, copyrighted typeface. This result is contrary to the policy of the Copyright Law, which grants to authors a defined, limited monopoly on their literary creations, not a perpetual one.

In addition, literary works already in the public domain will be able to be removed therefrom if reprinted in a protected typeface. Again, this result is contrary to the Constitutional mandate under which the Copyright Law was enacted. Therefore, the Register should give consideration to this possible result of her actions which goes squarely against the grain of the public policy embodied in the Copyright Law.

C. THE PROPOSED RULE CHANGE WOULD STIFLE THE CREATION OF NEW TYPEFACE DESIGNS

Another speaker at the November 6, 1974 hearing, Alfred Wasserstrom, Esq., representing the Hearst Corporation, emphasized the predicament facing book publishers in view of the proposed rule change. Publishers of books rely upon their printers to furnish them with typefaces. If the printer uses a registered typeface, the owner of the registration would be in a position to make demands on the publisher, and to initiate litigation. To prevent the possibility of such litigation arising, publishers will be forced to instruct their printers *not* to use registered typefaces, and to use only public domain faces. In time, there will be no demand for newly designed text faces, and the type-form designers will ultimately be the ones to suffer.

VI. The Notice Provision of Copyright Registration Cannot Adequately Be Applied Where Typefaces Are Concerned

Assume a new literary work is published in a new typeface which is subject to copyright protection. Certain questions arise: Should there be separate notices for each work; should there be a separate symbol to identify the copyright in a typeface? The case law presents some problems in answering these questions. *Ricordi* v. *Haendler*, 194 F.2d 914 (2nd Cir. 1952) states that typography is part of the work included in the copyright notice, and cannot be subject to a separate copyright apart from the work. Therefore, the *Ricordi* case suggests that a separate notice for typography is unlawful. To change this rule, either Congress or the Courts would have to act.

On works which are in the public domain, the application of a copyright symbol would cause an observer to believe that the entire work was copyrighted, and therefore effectively remove the work from the public domain. It would be difficult and impractical to devise a symbol which would indicate that the typography alone was copyrighted, especially in view of several decisions that state there is no reservation of a copyright in typography of a work. *Ricordi* v. *Haendler*, supra; *Desclee* v. *Nemmers*, 190 F. Supp. 381 (E.D. Wisc. 1961).

When a copyright notice is applied to a type font, what is protected? Is each individual letter protected, or would rearrangement of the letters to form words avoid the copyright? These are questions which must be resolved before a decision is made on registrability of type fonts to prevent uncertainty among the potential users of typeface designs.

Carrying this concept one step further, § 202.10(c) of the Copyright Regulations states that if a work is part utilitarian, and part aesthetic, the artistic contribution must be identified separately and be capable of existing independ-

ently as a work of art. Does this mean that only the part of each new letter design which is different from an existing alphabet letter design is eligible for registration? If so, only the swirls, hooks, dashes, serifs, or such would be eligible for registration while the remainder of the letter remains in the public domain. Furthermore, if only the artistic and not the utilitarian aspects of the letter are covered by copyright registration, the copyright symbol applied to the whole letter would be misleading. It would be difficult for a typographer to tell which part of the letter was covered by the notice and which part was in the public domain. See: *Ted Arnold Ltd.* v. *Silvercraft Co.*, 259 F. Supp. 733 (S.D.N.Y. 1966).

CONCLUSION

The proposed change in the Copyright Regulations to permit registration of typeface designs should not be enacted. The effects of such a change, both legally and practically, place such action far beyond the power of the Register of Copyrights. Congress or the courts should decide this question in the first instance, not an administrative officer of a legislative branch of our government. At present, the Copyright Office should hold any action in abeyance until pending litigation decides directly pertinent issues, or until the proponents of the change have had the opportunity to present their viewpoint to Congress.

FLAGSTAFF, ARIZONA,
July 15, 1975.

Congressman ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Patents, Trademarks and Copyrights, House of Representatives Judiciary Committee.

DEAR CONGRESSMAN KASTENMEIER: Through the pages of U&lc, an international journal of Typographics published by the International Typeface Corporation, I have become aware of the proceedings regarding the changing of Copyright Office regulations in permitting registration of typefaces.

I believe that such copyright protection is absolutely necessary to encourage and sustain the creative atmosphere vital to the Graphic Communications Industry.

I am very much in favor of a change in copyright regulations to include protection of typeface designs.

In closing, I thank you for your attention and ask that you please lend your support to promote, "the progress of the useful arts by securing for limited times to authors, the exclusive rights to their writings."

Most sincerely,

LUIS TOMÁS.

Mr. KASTENMEIER. I would like to call in connection with the so-called antipiracy aspects of present copyright law, three witnesses, Mr. Thomas Gramugliai for the Independent Record & Tape Association, Mr. David Heilman, for E-C Tape Service, a Wisconsin duplicator, and Mr. Alan Wally, for Record & Tape Association of America.

Mr. Gramuglia, you are first. Would you like to proceed?

TESTIMONY OF THOMAS GRAMUGLIA, INDEPENDENT RECORD & TAPE ASSOCIATION, ACCOMPANIED BY DAVID HEILMAN, E-C TAPE SERVICE, AND ALAN WALLY, RECORD & TAPE ASSOCIATION OF AMERICA

Mr. GRAMUGLIA. Can he go first?

Mr. KASTENMEIER. Yes, of course. Mr. Heilman, would you like to go first?

Mr. HEILMAN. Thank you, Mr. Kastenmeier.

Mr. Chairman, members of the committee, the title of the speech I have written is "Won't Get Fooled Again", which is a hit record by the "Who" in 1971.

My name is David Heilman, and I am the president of E-C Tape, Brookfield, Wis. I am here today to discuss with you the 1909 Copyright Act and in particular the compulsory license provision.

The 1909 Copyright Act was written at a time when the music industry's volume was a few million dollars per year. Today, this industry is $2.2 billion per year, larger than all sports combined in America, and larger than the movie industry.

The 1909 act was written, and I quote from the committee report: "To give the composer an adequate return for the value of his composition," and it has been a serious and difficult task to combine the protection of the composer with the protection of the public and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and, at the same time, prevent the formation of oppressive monopolies which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.

It seems, gentlemen, that the courts have been determined to change what Congress desired and have now given to the copyright holders the right to control all manufacturing and distribution of licensee music fixed prior to February 15, 1972.

When the recording companies approached Congress in 1967 and 1970 to obtain protection for their new hits, you were not told that five companies and their affiliates control the majority of the major copyrights in the United States. These five companies are CBS, WEA (in Atlanta), EMI (London, England), Polygram, and RCA.

Mr. Kastenmeier. Excuse me, Mr. Heilman. When you say major copyrights, you are referring to music?

Mr. Heilman. I am referring to the musical composition, the underlying works, sir.

EMI alone owns 400,000 copyrights. You were told many times that they had but small publishing houses and were independent third party people.

Congress granted protection for new music after February 15, 1972, and now the courts and the Solicitor General have said that you gave protection to all musical compositions, even those fixed prior to February 15, 1972.

This has led to the absurd conclusion that one may make similar use, but not identical use of a musical composition. Now, think for a second. If I obtain from CBS the performance rights to Tony Bennett's greatest hits, and then approach the copyright holder for a mechanical license, that same copyright holder can charge any price for the use of the composition or say no to the performance licensee as the compulsory licensee, as determined by the courts, does not apply since this use would be identical, not similar use.

This gives the public the mechanical trust that was feared in 1909 and has become a reality today.

When Congress granted relief with Public Law 92–140, the suggested retail of records was $3.98. Now, it is $6.98. You were told that if the pirates or re-recorders were put out of business, prices would drop. Have you or your family purchased a $3.98 record recently?

If this committee does not question some of these illegal practices immediately, then you will help the industry raise the price of a 35-cent

manufactured cost album to $8.98 within 3 years and a 50-cent manufactured cost tape to $9.98 in the same period of time.

The composer has been deprived of one-half of his royalties paid to the publisher, because the publisher has refused to accept the 2-cent compulsory licensee fee, and if I may digress for a moment, the 1909 Copyright Act was written to protect the author and composer. It says nothing of a man called a publisher. And now, the man who wrote that song never sees the money because the money automatically goes to the publisher by way of contracts.

You gentlemen just clarify the compulsory license provision for the musical composition fixed prior to February 15, 1972, by stating that one use of similar to all other uses and specifically in section 115, page 21, lines 21, of the bill 2223, drop the word "not" so that it reads, "a person may obtain a compulsory license for use of the work in the duplication of a sound recording made by another."

This change will stop the mechanical trust from growing until your committee has had time to verify who actually controls the majority of major copyrights in the United States, allow the composer an adequate return for his work, and stop the rise of prices to the public.

I have attached to this speech a copy of my catalog of music that the public is currently being deprived of the opportunity to own, and I only hope you gentlemen in Congress, as the hit record in 1971 stated, "Won't Get Fooled Again."

Thank you.

[The documents referred to follow:]

"Won't Get Fooled Again"

By the "Who"—1971

My name is David Heilman and I am the president of E-C Tape, Brookfield, Wisconsin. I am here today to discuss with you the 1909 copyright act and in particular the compulsory license provision.

The 1909 copyright act was written at a time when the music industry's volume was a few million dollars per year. Today this industry is 2.2 *billion* dollars per year, larger than all sports *combined* in America and larger than the movie industry. The act was written and I quote from the committee report "to give the composer an adequate return for the value of his composition" and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition, and at the same time prevent the formation of oppressive monopolies which might be founded upon the very rights granted to the composer for the purpose of protecting his interests. It seems, gentlemen, that the courts have been determined to change what Congress desired and have now given to the copyright holders the right to control *all* manufacturing and distribution of licensee music *fixed* prior to February 15, 1972.

When the recording companies approached Congress in 1967 and 1970 to obtain protection for their new hits you were *not told* that five companies and their affiliates control the majority of the major copyrights in the U.S. Those five companies are CBS, WEA, EMI, Polygram and RCA.

Congress granted protection for new music after February 15, 1972, and *now* the courts and the Solicitor General have said that you gave protection *to all* musical compositions, even those *fixed prior* to February 15, 1972.

This had led to the absurd conclusion that one may make similar use but not identical use of a musical composition. Think for a second. If I obtain from CBS the performance rights to Tony Bennett's greatest hits and then approached the copyright holder for a mechanical license, that same copyright holder can charge any price for the use of the composition or say *no* to the performance licensee as the compulsory licensee (as determined by the courts) does not apply

since this use would be *identical* not similar. This gives the public the mechanical trust that was feared in 1909 and has become a reality today.

When Congress granted relief with public law 92-140, the suggested retail of records were $3.98. Now they are $6.98. You were told that if the "pirates" or re-recorders were out of business, prices would drop. Have you or your family purchased a $3.98 record lately?

If this committee does not question some of these *illegal* practices immediately, then you will help this industry raise the price of a 35¢ manufactured cost album to $8.98 within three years and a 50¢ manufactured cost tape to $9.98 in the same period of time.

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I have attached to this speech a copy of my catalog of music that the *public* is currently being *deprived* of the opportunity to own.

I only hope you gentlemen and Congress, as the hit record in 1971 stated, "Won't Get Fooled Again".

Thank you,

David Heilman.


1955-1971
17 years 1955 - 1971
Top 16 songs of each year
Complete versions by original artists
$4.77 for records or $59.95 for entire library (a savings of $21.34)
$5.77 for tapes or $79.95 for entire library (a savings of $18.14)
Reel-to-Reel library only $120.00
FREE Ess-Ess wood & vinyl carrying case ($11.95 value) with library purchase
All Stereo
old & heavy gold
ELVIS PRESLEY

the story of the beatles

early beatles

ROCK & ROLL MUSIC
SHE LOVES YOU
THANK YOU GIRL
FROM ME TO YOU
MONEY
ROLL OVER BEETHOVEN
YOU CAN'T DO THAT
PLEASE MR POSTMAN
I FEEL FINE
TWIST AND SHOUT
BOYS
PLEASE PLEASE ME
I WANT TO HOLD YOUR HAND
I SAW HER STANDING THERE
ALL MY LOVING
HARD DAYS NIGHT

progressive beatles

NO REPLY
I'M A LOSER
BABY'S IN BLACK
MR MOONLIGHT
SHE'S A WOMAN
LOVE ME DO
P S I LOVE YOU
DO YOU WANT TO KNOW A SECRET
ACT NATURALLY
I'M HAPPY JUST TO DANCE WITH YOU
EIGHT DAYS A WEEK
I DON'T WANT TO SPOIL PARTY
THE NIGHT BEFORE
HELP
YOU'VE GOT TO HIDE YOUR LOVE
TICKET TO RIDE

evolutionary beatles

CAN'T BUY ME LOVE
FOR YOU BLUE
BABY YOUR A RICH MAN
I'VE JUST SEEN A FACE
NORWEGIAN WOOD
RUN FOR YOUR LIFE
I'LL FOLLOW THE SUN
HONEY DON'T
I'LL BE BACK
A TASTE OF HONEY
BABY IT'S YOU
WE CAN WORK IT OUT
YESTERDAY
IF I FELL
AND I LOVE HER
IF I NEEDED SOMEONE

revolutionary beatles

NOWHERE MAN
DAY TRIPPER
ELANOR RIGBY
YELLOW SUBMARINE
SGT PEPPER
WITH A LITTLE HELP FROM MY FRIENDS
LOVELY RITA
LUCY IN THE SKY WITH DIAMONDS
WHEN I'M 64
FOOL ON THE HILL
STRAWBERRY FIELDS
PENNY LANE
ALL YOU NEED IS LOVE
REVOLUTION
LADY MADONNA
COME TOGETHER

contemporary beatles

MICHELLE
HEY JUDE
PAPERBACK WRITER
BALLAD OF JOHN & YOKO
I SHOULD HAVE KNOWN BETTER
RAIN
DON'T LET ME DOWN
HELLO GOODBYE
LET IT BE
TWO OF US
I'VE GOT A FEELING
LONG AND WINDING ROAD
GET BACK
MAGGIE MAE
HERE COMES THE SUN
SOMETHING

beatles on their own

LENNON
OH YOKO
OH MY LOVE
IMAGINE
GIMME SOME TRUTH
HARRISON
WHAT IS LIFE
IF NOT FOR YOU
MY SWEET LORD
ISN'T IT A PITY
McCARTNEY
TOO MANY PEOPLE
THE LOVELY LINDA
MAYBE I'M AMAZED
EVERY NIGHT
STARR
IT AIN'T EASY
BYE BYE BLACKBIRD
STARDUST

- **Original Artists**
- **Stereo**
- **Complete Versions**
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Get Back	Beatles
Lay, Lady, Lay	Bob Dylan
Ruby Tuesday	Rolling Stones
Hey Jude	Beatles
The Times They Are A Changin	Bob Dylan
Jumping Jack Flash	Rolling Stones
She Loves You	Beatles
Blowin' In The Wind	Bob Dylan
Honky Tonk Women	Rolling Stones
Let It Be	Beatles
Mr. Tambourine Man	Bob Dylan
I Can't Get No Satisfaction	Rolling Stones
I Want To Hold Your Hand	Beatles
Like A Rolling Stone	Bob Dylan
Paint It Black	Rolling Stones
Yesterday	Beatles
Positively 4th Street	Bob Dylan
Get Off My Cloud	Rolling Stones

return of the BIG BANDS

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MADE IN U.S.A.

1929

SONGS ARTIST

Aint Misbehavin (J Teagarden P Whiteman
Mean To Me (T Wilson w Billy Holiday)
I'll Get By (Harry James w Dick Haymes
Button Up Your Overcoat (Ronnie Ogden
Marie (T Dorsey w J Leonard
Me and My Shadow (Jack Smith
Stardust (Morton Gould
Great Day (Pete Knight
Louise (Maurice Chevalier)
Some of These Days (Sophie Tucker
I May Be Wrong But (R Squires w W Scott)
Tip Toe thru the Tulips (Terry Baxter
I'll See You Again (Gladys Swarthout
Can't Give You Anything But Love (Sleepy...
With a Song in My Heart (Wally Scott)
Why Was I Born (Gog... ...ent

1930

SONGS ARTIST

Embraceable You (T Dorsey w Jo Stafford
Strike Up the Band (Pete Knight)
My Ideal (Maurice Chevalier
I Got Rythmn (Glenn Miller
Rockin Chair (Mildred Bailey)
Get Happy (R Squires w Wally Scott
Malaguena (F... Piano Quartet
Just a Gigolo (Tony Martin
Sunny Side of Street (T Dorsey Sentimentalist
Bidin My Time (J Brockton w Lee Roberts
Walking My Baby Back Home (M Chevalier)
Stein Song (Rudy Valee
Body and Soul (Terry Baxter)
Because (Richard Crooks
Were You Saved for Me (Wayne King
What is This Thing Called Love (Mel Torme

1931

SONGS ARTIST

Headaches (Elmo Tanner
Life Is Just Bowl Of Cherries (M Chevalier
Paradise (Terry Baxter)
Minnie the Moocher (Cab Calloway)
Blue Skies (Arranged by G Williams)
Of Thee I Sing (Robert Mandel)
The Peanut Vendor (Perez Prado)
All of Me (Connee Boswell)
As Time Goes By (Terry Baxter
Moon Comes Over Mountain (Columbia Orch
Lady of Spain (Hugo Montenegro)
Night Was Made For Love (R Paye w H Bowen)
Goodnight Sweetheart (R Nobel w S Lenson)
Mood Indigo (Duke Ellington)
Yours (Xavier Cugat w Dinah Shore
Dancing in The Dark (Terry Baxter)

1934

SONGS ARTIST

You're The Top (Johnson & Williams w H Bowen)
What A Difference A Day Makes (Frank Hunter
Don't Blame Me (Matt Dennis
Cocktails For Two (S Jones w City Slickers)
I'll Get Along Without You (H McIntyre)
Very Thought Of You (R Noble w S Lenson
One Night of Love (Grace Moore)
Moon Glow (Ames Bros w Sid Ramin)
Deep Purple (Terry Baxter
Good Night My Love (E Fitzgerald w B Goodman)
Blue Moon (Terry Baxter
All Through The Night (Percy Faith
Auf Wiedersehen My Dear (Russ Columbo
You & The Night & The Music (Robert Mandel
All I Do Is Dream Of You (Makem Lockyer
Solitude (Duke Ellington

1935

SONGS ARTIST

In The Mood For Love (Ken Bennett ... Johnny ...
My Man's Gone Now (Helen Jepson)
East Of The Sun West Of The Moon
Music Goes Round & Round (E Wright w T Dorsey
Summertime (Eleanor Steber
Begin The Beguine (Artie Shaw
Cheek To Cheek (Fred Astaire
Red Sails In The Sunset (V Monroe w Moonmaids
Foolish Things Remind Me (B Goodman w H Ward
Just Plenty Of Nothin (Lawrence Tibbet
Moon Over Miami (J Sherwood w E Duchin
A Sweet Mystery Of Life (J McDonald & N Eddy
Bess You Is My Woman Now (L Tibbet & H Jepson
You Are My Lucky Star (E Powell w T Dorsey
I'm Through With Love (Sarah Vaughan
It Ain't Necessarily So (Lawrence Tibbett

1936

SONGS ARTIST

Small Hotel (Johnny Douglas
Whiffenpoof Song (Jonny Douglas
It's A Sin To Tell A Lie (Fats Weller
I Only Have Eyes For You (G Gibbs w Dreamers)
Is It True What They Say About Dixie (P Harris
In The Chapel By The Moonlight
Ain't Misbehavin (Fats Waller
The Touch of Your Lips (Billy Dan)
Indian Love Call (N Eddy & J McDonald
Limehouse Blues (Duke Ellington
Pennies From Heaven (Robert Mandel)
Dream Boat Comes Home (G Lombardo w H Lombardo
Pony and (Lloyd Rose)
Moonlight & Shadows (E Duchen w J Sherwood
I Can't Be Started With You (Bunny Bergan
When I Leave Heaven (G Lombardo w C Lombardo

1937

SONGS ARTIST

Thanks For The Memories (Terry Baxter)
Be Mir Bist Du Schon (Guy Lombardo
Where Or When (Wally Scott)
Nice Work If You Can Get It (F Caste
My Funny Valentine (Mary Martin
Dipsy Doodle (T Dorsey w Edyth Wright
I've Got My Love To Keep Me Warm (L Brown
Donkey Serenade (Allan Jones)
So Rare (G Lombardo w C Lombardo
Vein Vein (Rudy Vallee)
Once In A While (Tommy Dorsey
Lady Is A Tramp (S Lacoste w R Mandel
September In Rain (G Lombardo w C Lombardo
Bob White (B Goodman w Martha Tilton
Moon Got In My Eyes (H Kemp w Bob Allen)
That Old Feeling (G Lombardo w C Lombardo

1940

SONGS ARTIST

Fools Rush In (T Dorsey w F Sinatra
Sweethearted Man (Nelson Eddy
Cabin In The Sky (Ethel Waters
Songs My Mother Taught Me (J Gregonette
Hear A Rhapsody (J Bennet w Bob Carroll
There I Go (Vaughn Monroe
Yes My Darling Daughter (Dinah Shore
The Last Time I Saw Paris (Lanny Ross
We Three (Bob Chester w Dolores O'Neill
Tuxedo Junction (Glenn Miller)
All or Nothing At All (F Martin w L Rogers)
Taking A Chance On Love (S Kaye w J Roberts
You Stepped Out Of A Dream (... ma Valente
When You Wish Upon A Star (Frank Barber
Nearness Of You (... w H Sinclair
Make Beautiful Music (Buddy Clark w W King

1941

SONGS ARTIST

Heart Of Texas (A Rey w B Schalle & S Hetu
Bewitched (Wally Scott
Concerto For Clarinet (Artie Shaw
Don't Walk Without You (A Shaw w Paula Kelly
Take The A Train (Duke Ellington
Dancing In The Dark (Art Shaw
Buckle Down Winsocki (James Waters)
Jersey Bounce (Benny Goodman)
There I've Said It Again (Vaughn Monroe
Chattanooga Choo Choo (Glenn Miller
White Cliffs Of Dover (Ken Bailie
This Love Of Mine (Tommy Dorsey & Frank Sinatra
Blues In The Night (Dinah Shore
The Hut Sut Song (Freddy Martin & Eddie Stone
How High The Moon (Terry Baxter
Don't Take Your Love From Me (The Three Suns

1942

SONGS ARTIST

Paper Doll (Johnny Gibbs
Jingle Jangle Jingle (Freddy Martin w C Rogers & S Wade
Sleepy Lagoon (Tommy Dorsey)
Juke Box Saturday Night (The Modernaires w G Miller)
Serenade In Blue (G Miller & R Eberle)
Happiness Is A Thing Called Joe (W Herman & F Wayne
When The Lights Go On Again (Vaughn Monroe
Warsaw Concerto (F Martin w J Fina
That Old Black Magic (Terry Baxter
Day Break (D Haymes & T Dorsey
My Devotion (Charlie Spivak & Garry Stevens
Rose O Day (F Martin & E Stoner
Strip Polka (A Rey w Four King Sisters
Tangerine (V Monroe
Perdido (Duke Ellington)
There Are Such Things (Frank Sinatra & Tommy Dorsey

1943

SONGS (ARTIST)

Speak Low (C Maxwell w Ronnie Ogden
For Me And My Gal (A Lyman ... w Bill Sherman
A Pink Cocktail For A Blue Lady (G Miller w Skip Nelson
Kansas City (Lee Dixon & Marc Platt
Manhattan Serenade (T Dorsey J Stafford)
Mairzy Doats (Four King Sisters
People Will Say We're In Love (A Drake & J Roberts
Besame Mucho (Andy Russel
Holiday For Strings (David Rose
Dearly Beloved (A Rey & B Schaler
Oh What A Beautiful Morning (Alfred Drake)
Moonlight Mood (G Miller & Skip Nelson
The Surrey With The Fringe On Top (A Drake)
Let's Get Lost (G Miller w Ray Eberle)
It's Always You (Teddy Powell w Peggy Mann
Oklahoma (Alfred Drake & Joan Roberts

1932

SONGS ARTIST

I've Told Every Little Star (B Johnson & D Hume)
Brother Can You Spare A Dime? (Rudy Vallee)
Willow Weep For Me
April in Paris (F Martin & Elmer Feldkamp)
Drums In My Heart (Robert Mandel)
Put Out Lights & Sleep (L Horne w L Hayton
Surrender Dear (Bing Crosby)
Mimi (Maurice Chevalier)
Speak To Me Of Love (Robert Bentley)
The Song Is You (Frank Sinatra)
Soft Lights Sweet Music (Wally Scott)
How Deep Is The Ocean (E Fisher w H Winterhalter
Getting To Be A Habit (G Lombardo w B Crosby)
Gotta Right To Sing The Blues (L Armstrong
Night & Day (R Peterson w W Scott
One Hour With You (Maurice Chevalier)

1933

SONGS ARTIST

I Wanna Be Loved By You (Helen Kane
The Carioca (Hugo Winterhalter)
Ever See A Dream Walking? (M Chevalier)
Who's Afraid Of The Big Bad Wolf? (Ben Bernie
Stormy Weather (Lena Horne)
Easter Parade (Peter Knight)
Inka Dinka Doo (Jimmy Durante
Smoke Gets In Your Eyes (Terry Baxter
Lover (Terry Baxter
Green Eyed Dragon (John Charles Thomas
Sophisticated Lady (Duke Ellington
Everything I Have Is Yours (Gene Austin
Heat Wave (Carla Maxwell w R Ogden
Orchids In The Moonlight (T Martin w A Sandley
Sentimental Fool (Don Carnell Sammy Kaye)
Temptation (Artie Shaw)

1938

SONGS (ARTIST

September Song (Walter Huston)
Jeepers Creepers (Terry Baxter
One O'Clock (Count Basie
My Heart Belongs To Daddy (Mary Martin
Must Been A Beautiful Baby (M Chevalier)
Married An Angel (Benny Goodman)
Flat Foot Floogie (Benny Goodman)
I'll Be Seeing You (Terry Baxter
Music Maestro Please (T Dorsey w E Wright)
Ti-Pi-Tin (G Lombardo w Lombardo Bros
You Go To My Head (J Savitt w Top Hatters
Any Old Time (Billie Holiday w W A Shaw)
My Romance (Adele Leigh w Richard Benson
My Reverie (Larry Clinton w Bea Wain
Change Partners
This Can't Be Love (Johnny Desmond

1939

SONGS ARTIST

Lara's Theme
Three Little Fishes (Kay Kyser
I'll Didn't Care (Ink Spots
Don't Love You? (A Shaw Helen Forrest
Said Yesterday Here Today (J Mercer w B Goodman
God Bless America (Kate Smith
Frenesi (Artie Shaw
Over The Rainbow (Hal Bowen
Beer Barrel Polka (Grand Musette Orchestra
Never Smile Again (T Dorsey F Sinatra Pied Pipers
All The Things You Are (J Leonard w T Dorsey
South Of The Border (Sons Of The Pioneers
My Prayer (Lanny Ross
Wishing (Skinnay Ennis
Day In Day Out (H Forrest w A Shaw
Lamp Is Low (G Miller w Ray Eberle

1944

SONGS ARTIST

Sentimental Journey (Hal McIntyre
Rum And Coca Cola (Vaughn Monroe
I Had To Be You (Earl Hines w Madeline Green
Strange Music (Johnny Douglas
San Fernando Valley (Four King Sisters
There Goes That Song (S Kaye & Nancy Norman
Accentuate The Positive (A Shaw w ... Lynn
I Love You (Wally Scott
Dance With A Dolly (Tony Pastor)
Blue Rain (G Miller w Ray Eberle)
Dream (Mel ...)
Don't Fence Me In (Roy Rogers
You Hurt The One You Love (S Kaye w B Wilson
I'm Makin Believe (H McIntyre & Ruth Gaylor
I Dream Of You (T Dorsey w F Stewart
Twilight Time (The Three Suns)

1945

SONGS ARTIST

It's Been A Long Time (H James w K Kallen
Atchison Topeka & Santa Fe (Dorsey Sentimentalists
Linda (Buddy Clark
Til The End Of Time (Perry Como
And The Angels Sing (Benny Goodman
June Is Busting Out All Over (Pete Knight
Boo Hoo (G Lombardo w Lombardo Bros
Old Lamp Lighter (S Kaye w B Williams
Day and Night For Singing (James Melton
Pennsylvania 6-5000 (Glenn Miller
If I Loved You (M Miller R Preston w S Mende
Laughing On Outside (S Kaye w B Williams
Symphony (Freddy Martin w Clyde Rogers
The Gypsy (S Kaye w Mary Marlow
Goody Goody (B Goodman w Helen Ward
La Vie En Rose (Edith Piaf

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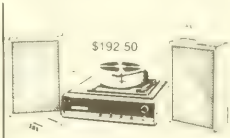

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- ☐ LOVE MUSIC
- ☐ STORY OF THE BEATLES
- ☐ THE BIBLE ON SOUND
- ☐ DYLAN BEATLES STONES

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Mr. KASTENMEIER. Now, Mr. Gramuglia, or Mr. Wally.

Mr. WALLY. I will go.

Mr. KASTENMEIER. All right. Mr. Alan Wally.

Mr. WALLY. Gentlemen, my name is Alan Wally. I am a small, independent retailer of prerecorded music, in the State of New Jersey, and president of a trade association representing small, independent, retail establishments that specialize in prerecorded music.

I am here today on behalf of my fellow retailers to testify against the proposed antipiracy provisions, in the field of prerecorded music, as they currently exist in the 1974 interim antipiracy bill, because the current antipiracy bill does not do what it is intended to do. It does the complete opposite.

As we understand it, the intent of the antipiracy bill was to protect the artist, the retailer, and the consumer. The current antipiracy bill only serves to hurt the aforementioned and, therefore, some modification, specifically mandatory licensing, is absolutely necessary, as this paper will demonstrate. It is our belief that two of the prime reasons the major labels are in favor of the antipiracy provisions are: To prevent and preclude the possibility of future competition by any legitimate duplicator who might be able to gain a national distribution and, therefore, promote and distribute new artists; and, to allow the major labels to further penetrate the retail market, to the detriment of the independent retailers, via expansion of, and additions to current record club and retail store ownerships by the major labels.

We demonstrate in this paper how the artist, the retailer and the consumer suffer as a direct result of the current interim antipiracy legislation. In addition, we demonstrate how everyone would benefit from mandatory licensing including the major labels.

I humbly urge you to read this paper in its entirety. I know it is not professionally written. However, if all of the points that we raise in this paper are investigated in an economic impact survey, this committee will come to the same conclusions that we have drawn. We are doing something very unusual today, compared to the record companies. We are telling the truth.

In light of the above, we respectfully request that you take the following courses of action.

(1) An immediate mandatory licensing bill, with mandatory licensing after 15 months separate and apart from the general copyright revision bill, to be attached to last year's interim antipiracy bill.

(2) An immediate form of relief, via the above, to override current Federal district court interpretations of the 1909 copyright law. Current Federal court interpretations have ruled that duplication under the 1909 copyright law to be illegal thereby costing the livelihood of over 15,000 people, and their families. A new bill specifically allowing mandatory licensing will revive this industry and will help improve our Nation's overall economic situation.

(3) An economic impact survey into the recording industry and the respective way five major labels, which control 85 percent of the field of recorded music, might be a form of structural antitrust, and guilty of conspiracy, collusion, and possible price fixing as I can demonstrate.

Further, we ask that the potential for a restraint of independent retail trade, by the major labels, via their ownership of record clubs and retail establishments, be given special attention by the Justice

Department at the express direction of this committee. We also ask that the Justice Department bring suit against those major labels for divestiture of their record clubs and retail establishments so as to prevent the major labels from putting a complete stranglehold on prerecorded music distribution.

(4) In addition to an economic impact survey we ask this committee to look into the current indictments against people in the recording industry as currently served by the Newark attorney general's office, and to quote the attorney general in California, "alleged fraudulent commercial practices in all facets of the recording industry" as presently being conducted by the Federal grand jury in the Central District of California.

[The prepared statement of Mr. Wally follows:]

STATEMENT BY A. WALLY, PRESIDENT, RECORD AND TAPE ASSOCIATION OF AMERICA

INTRODUCTION

Gentlemen, my name is Alan Wally. I am a small, independent, retailer of prerecorded music, in the State of New Jersey, and president of a trade association representing small, independent, retail establishments that specialize in prerecorded music.

I am here today on behalf of my fellow retailers to testify *against* the proposed anti-piracy provisions, in the field of prerecorded music (as they currently exist in the 1974 interim anti-piracy bill) because the current anti-piracy bill does not do what it is intended to do. It does the complete opposite.

As we understand it, the intent of the anti-piracy bill was to protect the artist, the retailer and the consumer. The current anti-piracy bill only serves to hurt the aforementioned and, therefore, some modification, specifically mandatory licensing, is absolutely necessary (as this paper will demonstrate). It is our belief that two of the prime reasons the major labels are in favor of the anti-piracy provisions are: to prevent and preclude the possibility of future competition by any legitimate duplicator who might be able to gain a national distribution (and, therefore, promote and distribute new artists); and, to allow the major labels to further penetrate the retail market, to the detriment of independent retailers, via expansion of and additions to current record club and retail store ownerships by the major labels.

We demonstrate in this paper how the artist, the retailer and the consumer suffer as a direct result of the current interim antipiracy legislation. In addition, we demonstrate how everyone would benefit from mandatory licensing including the major labels.

I humbly urge you to read this paper in its entirety. I know it is not professionally written. However, if all of the points that we raise in this paper are investigated in an economic impact survey, this Committee will come to the same conclusions.

In view of the above, we respectfully request that you take the following courses of action:

(1) An immediate mandatory licensing bill, separate and apart from the General Copyright Revision Bill, to be attached to last year's interim anti-piracy bill.

(2) An immediate form of relief, via the above, to over-ride current Federal District Court interpretations of the 1909 Copyright Law. Current Federal Court interpretations have ruled that duplication under the 1909 Copyright Law to be illegal thereby costing the livelihood of over 15,000 people (and their families). A new bill specifically allowing mandatory licensing will revive this industry and will help improve our nation's overall economic situation.

(3) An economic impact survey into the recording industry and the respective way five major labels, which control 85% of the field of recorded music, might be a form of structural anti-trust. Further, we ask that the potential for a restraint of independent retail trade, by the major labels, via their ownership of record clubs and retail establishments, be given special attention by the Justice Department at the express direction of this Committee. We also ask that the Justice Department bring suit against those major labels for divestiture of their

record clubs and retail establishments so as to prevent the major labels from putting a complete stranglehold on prerecorded music distribution.

(4) In addition to an economic impact survey we ask this Committee to look into the current indictments against people in the recording industry as currently served by the Newark Attorney General's Office and into the "alleged fraudulent commercial practices in all facets of the recording industry" as presently being conducted by the Federal Grand Jury in the Central District of California.

ARTISTS

One of the prime reasons the major labels cite as necessity for an anti-piracy provision in the copyright bill is protection of the artist. We are in agreement with the spirit of intent of the anti-piracy provisions, HOWEVER, THE ANTI-PIRACY PROVISIONS AS THEY CURRENTLY EXIST (AS IN THE 1974 INTERIM ANTI-PIRACY BILL) THE ARTIST IS NOT BEING PROTECTED; HE IS BEING HURT. AN ANTI-PIRACY PROVISION, WITHOUT SOME FORM OF MODIFICATION—SPECIFICALLY MANDATORY LICENSING—IS NOT IN THE ARTISTS BEST FINANCIAL INTERESTS! That is to say, an artist will definitely benefit financially under a mandatory licensing provision because the artists will be paid when they are no longer being paid and/or produced by the major labels and the major labels won't lose anything by it.

To understand how an artist would benefit under mandatory licensing—while the major will not be hurt let us examine the following facts and definitions.

(1) A musical artist is someone responsible for the creativity part of a record; the writer and the singer (or musician).

(2) An artists' longevity—as an artist—is quite limited! Elvis Presley and Frank Sinatra have been around twenty years or more. But how many Elvis Presleys are there? How many artists are no longer around after one or two years. Therefore, it is only right that an artist make as much as possible in his productive years to keep him in his non-productive years. Also, the artist should be able to have the opportunity for reward to inspire him to create.

(3) The term cut-outs: In the past a retailer had guaranteed sales. He would buy a record or tape and at the end of a season return the tape or record for full credit. The record companies would, in turn, dump those records and tapes at firesale prices. To keep a retailer from buying at firesale prices and then claiming he found a whole group of tapes in his basement that he overlooked (and now wants to return them to the major labels for full credit) a corner of a record album was cut or a hole is drilled through a tape. This indicates that that particular tape or record was bought on a no return basis.

In defense of my claim let us consider that after a record becomes a cut-out the artist is no longer paid—or, at best, if he is a powerful performer who has renegotiated his contract, paid less than the regular royalty rate.

How will mandatory licensing correct that situation and earn the artist his just rewards. I would like to quote from Page 5 of the Simon & Garfunkel contract dated 2/10/64 and running through 2/9/72 with Columbia Records. Section d. "No royalty shall be payable to you in respect of phonograph records sold as "cut-outs" after the listing of such records have been deleted from our catalogs or in respect of phonograph records distributed as "free" or "no charge" records to promote the sale of phonograph records . . ." (There will be further discussions about record clubs in my comments on the retailers, thoughts about the copyright bill.)

As of last week the average life on the charts was 16 weeks for the average record. This is to say, if record number one is on the hit charts for 20 weeks and record number two is on the hit charts for ten weeks, collectively they are on the charts for a total of 30 weeks or, 16 weeks average per record. If you take a look at Billboard's survey of the top 200 record and tape albums and add the total number of weeks and divide by 200 you will come up with this 16 week average. And, on the average a record or tape becomes a cut-out in about six months.

Tommy Noonan, assistant to the president at Motown, pointed to a five month selling curve for an LP noting that "if you issue an RA in the fifth month and you get it back by the seventh, the product is in effect a cut-out". (Sic: at the time you issue the RA—Return Authorization) (Billboard March 15, 1975.)

Furthermore, might I point out that the artist is now always paid in full, or on time, by the major labels according to J. Cooper, President of the N.A.R.A.'s. "The artists are paid on 90% of what is sold which is a figure that dates back to

when records were breakable; Now this is a way to cheat the artist." (Both of these quotes can be found in the August 17, 1974 issue of Billboard Magazine.)

"Attorney J. Cooper offered a rare insight into the problems from the standpoint of artists and publishers. One of the big problems in the reserve situation that labels use to hold back royalties. The attorney said he knows of companies holding back 80% (sic of royalties) and withholding royalties for from one to ten years.

"If an artist has been told he's sold 1 million records and he may get paid for 200,000 units in his statement, this makes him very unhappy." Cooper said, "the record companies say they must hold back in reserve because they don't know what's coming back." Cooper said he felt there was no reason to hold back the royalties. (Billboard March 15, 1975) Under compulsory licensing the artist would be paid.

As a matter of fact, just recently several executives of major labels were indicted by the U.S. Attorney General's Office for, among other things, a "scheme (sic: to) defraud recording artists, songwriters and music publishers of royalties and fees owed them. . . ." (Billboard July 5, 1975) "The indictment also charges that the defendants obtained in excess of $371,000.00 in cash and merchandise by selling the product at less than wholesale prices, and then not entering a sale on the companies's books. The scheme, charged to be in effect from January 1, 1971 through presentment of grand jury findings, was directed solely for personal gain or for payment to radio personnel.

I fail to understand how the record companies are protecting the artist when (A) they are not paying royalties on anything that goes off the charts (B) 95% of the records that were produced a year ago are no longer being produced and (C) under mandatory licensing the artist would be getting paid royalties on records that the record companies aren't selling and, therefore, aren't losing any money on.

I know that the above is the most simple and logical argument for mandatory licensing that there is. Everybody gains and nobody loses.

As a matter of fact, mandatory licensing provides additional benefits to the artist and to the record companies.

Let me explain that statement with an analogy. When I was studying advertising in college we learned that the people who study the automobile ads most intently are the people that have just bought new cars. It is called positive reinforcement. It is my finding as a retailer that some people who have become a fan of a particular artist like to have his entire series of albums and/or tapes. If they obtain this entire series, this then becomes a positive reinforcement to collect his newer releases and creates an even stronger demand for the artist on the personal appearance level. It is on the newer releases that the record companies earn their monies.

But that's not just my opinion. Ed Barsky, President of Kester Marketing, who was quoted in Billboard Magazine as saying for example, "if someone buys a Lobo album at $1.99 and then hears a Lobo hit on the radio, he may buy some of the new product".

Might I point out that there are currently some artists (song writers) who fare far better with the duplicators than they do with the major labels.

The 1909 copyright law requires that a mechanical royalty of 2¢ be paid to the owner of a song. That owner is paid the full 2¢ by duplicators. I do not believe he is paid such by the major labels despite the 1909 copyright law. My belief is based on the following excerpts from an anti-trust law suit. In addition I feel that a full economic impact survey by the Justice Department is called for—

"I would like to refer to a class action for a conspiracy and violations of anti-trust laws filed June 8, 1972 in the U.S. District Court for the Middle District of Tennessee, Nashville Division by Mr. Clarence Selman, Buddy Mize, et al and on behalf of themselves and all others similarly situated (about 20 names were mentioned as plaintiffs) versus Columbia, RCA, MCA et al. defendants. The brief said the following, "the continual creation of original lyrics and/or music for musical compositions; (referred to hereinafter as songs) acceptable to the mood and taste of the public, requires a very high degree of skill and knowledge. The inception of the vast economic activity generated by the music business is dependent upon and conceived in the talents and abilities of the songwriter, and the total industry is sustained and its growth nurtured only by the continual creation of new songs. The usual way in which a songwriter brings his songs to the public is through a music publisher . . . and it is standard for the writer to

receive 50% of the mechanical-license fees collected by the publisher... the publisher promotes and exploits the song for the purpose of getting it recorded by a recording artist. If the publisher is successful in this endeavor, he applies for a copyright on the song . . . and, thereby, becomes entitled to receive a royalty fee of 2c for each and every mechanical reproduction of all subsequent recordings of that song pursuant to the compulsory licensing provisions of the copyright act." [See exhibit 2 for balance of this quote.]

There is a definite reason why the major labels are for strong anti-piracy provisions in the general copyright bill, and are against mandatory licensing. However, I do not feel that it is truly to protect the artist —or the profits of the major labels (they cannot lose profits on items they do not make). I feel it is to prevent competition, an aspect I will discuss further.

Another way the record companies protect the artist is with a slavery clause in an artist's contract called the suspension clause. It gives the record companies the right to suspend an artist for whatever period of time it deems necessary where he may be unproductive. And tack that period of suspension onto the end of his contract so that if he had a two year contract and was under suspension for six months the full contract becomes two years and six months. In a way this does not jive with what the record companies have been telling Congress about how they have to pay non-productive artists.

"Capitol Records has filed a $5 million suit against Grand Funk Railroad and MCA Records in State supreme court here charging the group with failure to complete its contractual commitments, and challenging the legality of Grand Funk's move to sign with MCA Records. MCA's pacting of the top-selling act was announced last week." (Billboard, June 28).

"At the same time, the Capitol suit seeks a court ruling on the validity of the "suspension" clause in its agreement with Grand Funk and its right to extend the contract term until artist obligations are met. The suspension issue has gained prominence recently via a case, still pending, involving Vanguard Records and Larry Coryell." (Billboard Magazine, July 5, 1975.)

RETAILERS

One of the reasons the major labels cite as a necessity for strong anti-piracy provisions in the General Copyright Revision Bill is to protect their customers, the retailer! I am a retailer. I am here to testify about the way the average small non-chain retailer feels about the General Copyright Revision Bill.

In addition to myself, I speak for hundreds of mom and pop shops across the country. I am President of the Record and Tape Association of America whose membership roster is mostly small New Jersey retailers. But, we have spoken to other retailers in Connecticut, New York, Pennsylvania and Vermont and feel that our views are reflective of most of the mom and pop shops across the country.

In essence we are against the anti-piracy provisions of the general copyright revision bill! The provisions as they are currently designed, without some kind of modification—specifically a mandatory licensing provision—will not only not protect. They will harm.

As small retailers we make our living solely from prerecorded music (and possibly some hardware such as recorders and players). This is in contrast to a department store which runs a record department.

If my customer does not buy what I sell I am out of luck. In a department store, if they don't buy a record (or tape) the customer will buy something else, such as a pair of jeans.

Because department stores do not rely solely on their record departments for their livelihood, therefore, they can run loss leader record sales to draw customers. They usually run sales on the most current records and, in a way, they are "skimming the cream" because that is all they offer, only the current hits.

As a small retailer I have to offer a service to justify my existence. One of the services I used to offer is out of date prerecorded music to complete the collections of fans who suddenly were "turned on" to an artist and wish to complete his entire collection. I sold duplicated tapes that were no longer being produced by the major labels. Those duplicate tapes sold retail—provided a marginal profit that meant the difference between staying in business and working for someone else.

I have recently been precluded from selling duplicated tapes by a Court decision of a Federal District Court.

"It is the official national policy that small business deserves a thumb on the scale to help balance the greater financial muscle and managerial sophistication of the big corporations". (Business Week 6/30/75)

It is for the above reason that I am here today. I, and my fellow retailers, need protection not only from tape pirates (who should be distinguished from tape duplicators) but we want to be protected from the major labels as well.

To begin with, as small retailers, we need all of the sales and profits we can get. We fail to see how the major labels are protecting us by preventing us from selling merchandise that they no longer produce. That is our first and prime complaint against the major labels.

Under mandatory licensing we would have available to us additional product that will help us get and keep customers so that we can sell current major label products as well.

In addition, previous testimony has shown that five major labels control 85% of the music industry either directly or indirectly.

The major labels claim that they seek anti-piracy provisions in the copyright law to protect us, the retailer. But what is to protect us from the major labels who compete with us by forming their own record clubs and opening up their own record stores?

We know about RCA's record club and Columbia's. In addition, the president of Polydor music says that direct marketing is a goal and GRT plans direct mail campaign through the use of fan clubs. (Billboard)

How many other major labels will protect me by stealing my customers?

We know that CBS and ABC own several hundred record stores. Mr. Heilman, who is also giving testimony today, has tried, in court, to find out what other labels own stores but has been unsuccessful to date.

The major labels with record clubs protect the small retailer by offering special albums "not available in any retail store" (such as songs of the 40's that Columbia offered on Television in June, 1975). Mandatory licensing would be a thumb to weight the scale in our favor.

Additionally, they offer "special deals" such as "buy four for $1.99 (plus shipping and handling, of course) and nine more at the "regular" price (which is full list price) in the next two years. This they are able to do by taking it out of the financial hide of the artists by not paying the artist full royalties (and in some cases no royalties at all). Please see Exhibit One, Sections, B, C, and D, Page 5, of Columbia Records contract with Simon & Garfunkel. Again we ask for a thumb to weight the scales in our favor.

Why does Columbia Records, which we believe is a separate corporate entity than Columbia Music, get, it appears, their merchandise at costs lower than a regular retailer? We think that a Justice Department inquiry into their interrelationships between the record clubs and their parent campanies, during the course of a much needed economic impact survey might provide some interesting answers.

Furthermore, the small independent retailers are quite concerned about those inter-relationships because some inference that can be drawn about the possibilities of Restraint of Trade.

Specifically, we know that ABC & Columbia own retail record outlets. We also know Columbia was thinking about selling record club selections through department stores. If a major label which has a monopoly—via copyright—to a particular song makes that song available only in its retail outlet, it does so to an independent retailer's detriment. Again I quote Billboard, "CBS and Columbia, long the industry bellwether". The conclusion is obvious. Mandatory licensing is needed as some sort of a thumb to tilt the scale in the favor of the retailer who is supposedly being protected by the major labels.

Some of the smaller retailers feel that the major labels may be in violation of the Robinson Patman Act. I refer specifically to my experience with RCA. This June, 1975 I tried to buy directly from RCA and was told by RCA that if I wanted to achieve a price of less than $4.01 a tape that I had to prove one of two things. Either I was a distributor in which case I had to file affidavits showing that I was a distributor and reselling to their retail outlets or that I was getting a lower price than $4.01 from Columbia Records. RCA told me that they are followers, not leaders in the record industry and that if I could document that I was getting a lower price than $4.01 from Columbia records then they would give me the same price.

Now the Robinson Patman Act says that for some one customer to achieve a lower price than another customer it has to be on economies of scale. If 300 of

ABC's stores order 100 tapes; and each store's order is filled on an individual basis that is 300 orders of 100 tapes each which cost the major label the same to ship as my 100. Why should I pay a higher price.

Therefore, as president of the Record and Tape Association of America; and spokesman for hundreds of small retailers I humbly ask for the following "Thumb", from the Judiciary Subcommittee, to help us tip the scale not against the record companies but just back to zero.

(A) Mandatory licensing of merchandise the major labels are no longer producing (and some safeguards designed to keep them from claiming they are producing things they are not, or on such a small scale that for all intents and purposes they are not producing).

(B) An economic impact survey to determine the feasibility of the above (in the interests of justice).

(C) An expansion of the economic impact survey to see how completely vertical the major labels are and whether or not their affiliated record stores, and record clubs are in restraint of trade and are violators/or potential violators, of the Sherman-Clayton Anti-Trust Acts.

(D) That the action in regards to mandatory licensing be immediate because of the fact that hundreds of mom and pop stores across the country were put out of, or will be put out of business shortly by a court interpretation of the 1909 Copyright law. It was indicated that the 1909 law said "similar use" and that the Judge found duplicated tapes exact use. However, if Congress were to spell out what can be duplicated, the issue would be at an end and many small retailers would once again be provided with the marginal profit that spells out keeping a shop open or closed.

There was a point I tried to raise in Paragraph 5, Page 8, that appears unclear, which I am unable to correct in the text. I will do so now.

We know that ABC and Columbia own retail record outlets. We also know that the major labels have been uncooperative in revealing any further relationships with any additional retail outlets (CBS owns Pacific Records, ABC owns Target retail outlets). If a major label which has a monopoly—via copyright—to a particular song and, if that major label makes that particular song or album available only through its retail outlets (as they currently do through their record clubs), then what will be the effect on the poor, struggling, independent retail outlet. The result of that is obviously that the independent will be put out of business.

The members of my organization have voiced their opinions that such actions are a feared possibility and feel that mandatory licensing will serve as a thumb on the scale to help balance this eventuality (of going out of business) by allowing us to offer merchandise that a record company's retail outlet does not offer; we can offer out of date merchandise no longer being produced by the major labels that will allow us to draw customers.

CONSUMERS, THE PUBLIC AND SOCIETY

As retailers, my colleagues and I serve the consumers. Therefore, we know we can state what they want, and what is in their best interests.

The major labels claim that anti-piracy provisions are needed, as part of the General Copyright Revision Bill, to protect the consumer.

We, as retailers, and members of the Record and Tape Association of America, state that not only will the anti-piracy provisions not protect the consumer—the anti-piracy provision can only serve to hurt and deny the consumer. In addition, anti-piracy provisions reverse what the public has decreed and are not beneficial to society as a whole.

To begin with, the major labels claim duplicated tapes are inferior to major label tapes. As a retailer who has handled both I say this is not so. Furthermore, I suggest that this Committee read what Consumers Reports, September, 1975, has to say about the quality of major label 8 track tapes. I am sure that after reading the above, the argument of major label superior quality will be buried forever.

Representative Danielson has been quoted as saying, "to copyright is to promote the arts"!

The primary goal of Article I, Section 8, of the Constitution, relative to promoting science and the arts is to enrich all of society by assuring the free flow of ideas and creation. Congress, in implementing this goal has awarded monopolies in the form of patents and copyrights to enable the creators to reap the rewards of their efforts and to spur those creators to new efforts.

In terms of recorded music we can understand an anti-piracy statute as it applies to music that is currently being produced by the record companies. However, we feel that the goal of patents and copyrights is to enlarge science and the arts. Rewarding creators is only the method. When the record companies remove a song from the public domain at that point mandatory licensing should be allowed because the public has the right to that continuum of music or ideas for which it has already rewarded the holder of that patent or copyright.

One argument that has been made for mandatory licensing is the fact that less expensive music would be available to the public. I think we should dispense with this argument immediately, in a qualified manner. The record companies have invested a certain amount of money on which they should be entitled a fair return on investment, mandatory licensing would not infringe upon the profits and sales of the record companies.

However, what mandatory licensing would do is make available to the public songs that are no longer being produced by the major labels. Again, we reiterate that the average life on the hit charts is 16 weeks.

Coincidentally, I am positive that although the duplicators would have to pay the full royalties to the recording artists and the songwriters, it has been my finding that the duplicators work on a fair profit (instead of the highly inflationary profits of the major labels) and since there should not be a monopoly as to only one duplicator having one artist (such as only RCA has Elvis Presley) that the duplicators would practice free competition and that would automatically keep the prices low.

As retailers, we need customers to stay in business. We are all aware that our economy is in terrible shape; unemployment is rampant. When a person is unemployed he doesn't spend on goods and services; this leads to further unemployment. Social unrest, which is one result of unemployment, is detrimental to society.

In today's economy society has to be worried about an industry which could employ directly and indirectly up to 100,000 people. Governor Milliken of Michigan, in vetoing that state's anti-piracy bill found it would put 300 people directly out of work. Since the average family is 4.3 people that means that duplicating in the State of Michigan is directly responsible for feeding 1,290 people (and since the multiplier of money spent is 2.3 in calculating GNP) and indirectly responsible an additional 1,677 people for almost a total of 3,000 people in the State of Michigan alone.

The figures that we have cited are for those people that are directly involved in duplicating in the State of Michigan but what about those involved in the auxiliary services such as the manufacture of raw tape, plastic parts, labels, packaging materials and distribution. We can readily see that just in the State of Michigan alone duplicating can be a viable industry that (extrapolating to 50 states) can be responsible for directly and indirectly feeding 100,000 people in America.

Might I further point that in the shape the economy is in, quite frankly, we could use an additional 100,000 employed people.

I would also like to cite Page 6 of the July 5, 1975 Billboard where it says "18 Labels Face Boycott By Youngsters". The planned boycott is the outgrowth by Youth Action Now Group who are trying to get the major labels to hire inner city youngsters in conjunction with President Ford's youth employment program.

TO CONCLUDE

The consumer has the right to be able to buy recorded music. If the major labels—which have been given copyrights so that they can profitably produce music—refuse to do so then, the copyright should be licensed to others so that the consumer can be served. Therefore, to protect the consumer some form of mandatory licensing is needed.

MAJOR LABELS: THE REAL REASON WHY THEY REALLY WANT AN ANTI-PIRACY LAW

The major labels have been requesting special protection laws claiming that protection is needed for the artist, the retailer and the consumer. We have just seen that not only will anti-piracy laws not do the job intended; they will be of detriment to the artists, the public and to us, the retailers.

But, it is about time someone considered the real reasons why the major labels want the anti-piracy (anti-duplication) provisions attached to the General Copyright Revision Bill. And, if the reader will be kind enough to read this entire

article through it will be obvious that the one reason the major labels seek an anti-piracy (anti-duplication) bill is to prevent future and potential competition. (It is necessary that the reader read Exhibit Two.)

Mr. Dave Heilman is a reasonable example of what I refer to. (He is a duplicator who is also testifying.) Mr. Heilman's firm distributed prerecorded, pre-1972, music on a national basis. Since Mr. Heilman can distribute, on a national basis, "old" music it is possible for him to promote and distribute newer artists; and this is what the major labels fear. Also, since Mr. Heilman has been paying the full 2¢ mechanical royalty fee (and, according to the excerpts of the law suit, Exhibit Two, the major labels do not) it is conceivable that some songwriters might sooner want to do business with Mr. Heilman than with the major labels.

Also, let us consider a duplicator I know, who works in the New York City area. New York has some large ethnic concentrations and this duplicator produces and distributes his own legal music. He produces Yiddish, Greek, Spanish and Arabic music. He has the ability to distribute soul music as well. Now that poses a threat to the major labels. All the guises that they are using to claim unfair competition just are not so. I grant you that a pirate is a major threat to the economic well being of the artist and the retailer. However, in no way is a duplicator a threat—quite the contrary he would be an asset as I have demonstrated before. Yet, why do they fear the duplicators? The answer is only as possible future competition for the distribution of new artists (as I feel an economic impact survey would show, just as it would show that 85% of all music distributed is distributed by just five firms).

If the public got wise to the fact that mandatory licensing is beneficial to everyone then, we may end up with mandatory licensing being allowed—or at the least not banned. That is why the major labels are seeking anti-duplication laws on the state level. It's funny to note how many millions of dollars the record companies are spending on a state level for state anti-duplication laws—under the guise of anti-piracy statutes. Why seek anti-piracy penalties when there are Federal laws with stiff penalties?

The best they can do is seek to ban the pre-1972 music which, up until March, 1975 was not covered by the Federal Government, and, this is music that they are no longer producing, and that the pre-1972 music keeps on getting older and older and less and less salable. Why are they spending all this money in an area of sales that will phase out in history? The answer is to prevent possible future competition.

As it is now, the major labels can prevent an artist from leaving to join another major label by extending, unilaterally, the artists contract via the Suspension Clause (discussed previously). As an example Capitol Records is suing the musical group, Grand Funk Railroad, to enjoin them from recording for MCA records until their contract (extended under the Suspension Clause) is completed.

Furthermore, we should ask that this Judiciary Sub-Committee call for an economic impact survey and look into an aspect of anti-trust, called structural anti-trust, which is an anti-competitive effect that comes about naturally when a small number of companies account for a substantial portion of an industry's sales. Five major labels control 85% of all music in America.

We also ask that you look into the inter-relationships of CBS and RCA with the book publishing companies such as Random House and Holt-Rinehart & Winston (which I believe are being looked into right now by the Justice Department but under a separate matter), their relationships with music publishing companies, radio broadcasting companies (again Justice Department is looking into this), the motion picture industry and, as retailers we are most concerned about the relationships of the major labels, their record clubs, and their ownership of retail outlets.

The June, 1975 issue of Consumer Reports covers structural anti-trust and economic concentration and points out that the Justice Department is bringing suit against A.T.&T. for similar reasons of economic concentration. There is a better word for what the major labels are—it is called oligopoly. To quote Consumers Reports, "once an industry is concentrated it often stays that way because potential competitors can't get started. They run up against market factors called entry barriers (or in this case an anti-duplication law). In an ideal competitive market many sellers vie for the consumers dollars. The sellers must constantly compete for the consumers favors through innovation that raise quality and efficiencies that lower costs and permit price reductions."

However, a study conducted by the Center for Study of Responsible Law noted, "Because there are a few firms (in an oligopolistic industry), the actions of one are noticed by the rest; each realizes that any move on its part—a price increase, for example—will generate a reaction by the other firms. Since the best way to maximize profits is to act as a monopolist would, the oligopolistic firms begin to march to the same corporate drummer. Such joint behavior has been described as 'parallel pricing', conscious parallelism or what one former anti-trust official has called conspiracy through newspaper pronouncements. The technique is simple. U.S. Steel announces a price increase of 6% on any major product; within two days all other firms increase their prices by an identical amount. No formal price fixing conspiracy has occurred—but the effect is the same".

Price in oligopolistic industries, according to various estimates, are ten to 30% higher than they would be if those industries were less concentrated. If the oligopolist's prices are high, they are relatively impervious to the workings of supply and demand, according to economist John Blair.

And Senator Philip Hart, Chairman of the Senate Anti-Trust and Monopoly Sub-Committee contends that oligopolists "can often establish price independent of the forces of supply and demand. They fuel chronic inflation.

That brings me to the record companies. Last year there was a five cent increase in a pound of oil based plastic parts, and, according to Billboard magazine, all of the major labels raised all of the prices on most of their titles by the sum of $1.00 at the exact same point in time. (And that is for an eight track tape that cost less than 60¢ to produce that now retails for $7.98.) Furthermore, I mentioned this fact in my December letter to Mr. Wayne Valis, Assistant to the President of the U.S., and bet him that if the interim anti-piracy bill was passed there would be another go round and the major labels would raise their prices again. Sure enough in January, 1975 we read in Billboard that Columbia has raised the price on some of its titles by the sum of $1.00 and, that the other major labels are keeping their eyes on Columbia because Columbia is the leader (which goes back to what Mr. Steve Feldman of RCA told me about proving my price accomplishments with Columbia before RCA will grant me the same price concession). And if I can quote from Consumers Reports again, "Oligopolists needn't formally conspire to control prices; they just follow the price leader". As I have said, Columbia is the industry leader and if I may quote the June 2, 1974, Page 10 Bilboard it says, "the consensus of opinion means that once CBS moves into the new suggested list price the entire industry will follow suit" holds true.

In addition, I would like to suggest to the members of this Committee that they ask the Justice Department to conduct that economic impact survey and also investigate the pricing structure of records and tapes. If you take a look at Billboard Magazine you will see almost every tape that has the same number of songs in it lists for the same list price, regardless of the costs to produce that tape and the different costs among manufacturers. Although RCA can claim they are doing it to remain competitive with Columbia and vice versa it is an absolute crock of nonsense simply for the fact that the industry is really non-competitive. How, and with whom, can Columbia compete—with RCA who has, for instance, Elvis Presley? Columbia cannot sell Elvis and, therefore, can't compete with RCA.

As retailers we frown on dumping! When a firm dumps—or sells overseas at a lower price than domestically—it means that our customers are being cheated. Furthermore, if dumping hurts the local industry of the foreign country that an American product is being dumped in, our country once again suffers the title of "ugly American". Yet the major labels have been doing that (if the reports in Billboard are correct). "British Seek Ways To Curtail U.S. Cutouts . . . . U.S. Cutouts Draw Canadian Complaints . . . . Showing Complete Disregard For Songwriters, Publishers And Artists Trying To Make A Living . . . (headlines of recent Billboard articles). Why are cut-outs available overseas—and at lower prices when cut-outs are hard to come by in the U.S.A. and, when they are available it is at much higher prices than the 50¢.

EXHIBIT ONE

Section B

In respect of phonograph records sold through any direct mail order operations or through any direct sales to consumer operation carried on by us, our subsidiaries, affiliates or licensees including, without limitation, the Columbia Record Club (hereinafter collectively referred to as "Club Operation"), the royalties pay-

able to you shall be one-half the royalties which would have otherwise been payable to you with respect to such phonograph records; provided, however, that no royalty shall be payable to you with respect to (i) phonograph records which are distributed to members of any such Club Operation, either as a result of joining Club Operation, recommending that another join such Club Operation and/or as a result of the purchase of a required number of records including, without limitation, records distributed as "bonus" and/or "free" records, or (ii) phonograph records for which such Club Operation is not paid.

Section C

In respect of phonograph records sold to our clients for promotional or sales incentive purposes, the royalty rate payable to you shall be one-half of the royalty rate otherwise payable and shall be computed on the basis of the actual sales price therefor (less all taxes and container charges) to our said clients or their designees.

Section D

No royalty shall be payable to you in respect of phonograph records sold as "cut-outs" after the listing of such records has been deleted from our catalog or in respect of phonograph records distributed as "free" or "no charge" records to promote the sale of phonograph records embodying your performances.

EXHIBIT TWO

Excerpts from class action law suit against major labels filed June 8, 1972, U.S. District Court, Nashville, Tennessee by Mr. C. Selman et al. versus Columbia, RCA, MCA, et al.

Section 3

Each of the plaintiffs is owner of original musical compositions and/or the copyrights thereto, entitling them to be paid royalties for all sound recordings and mechanical reproductions thereof pursuant to the Copyright Act of 1909.

Section 6

The plaintiffs bring this action on their own behalf and as representatives of the class herein described, to wit: songwriters and independent music publishers who, in lieu of the royalty fees afforded them by the Copyright Act of 1909, have become parties or beneficiaries to licensing agreements with one or more of the defendants. The number of said songwriters and publishers is estimated to be in excess of four thousand.

Section 22

Capitol Industries, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Hollywood and Vine, Hollywood, California, and transacts business in the Middle District of Tennessee and controls Capitol Records, Inc.

Section 23

American Broadcasting Companies, Inc., is a corporation organized and existing under the laws of the State of New York with its principal place of Business at 1330 Avenue of the Americas, New York, New York, and transacts business in the Middle District of Tennessee and controls ABC Records, Inc.

Section 24

The continual creation of original lyrics and/or music for musical compositions (referred to hereinafter as "songs") acceptable to the mood and taste of the public, requires a very high degree of skill and knowledge. The inception of the vast economic activity generated by the music business is dependent upon and conceived in the talents and abilities of the songwriter, and the total industry is sustained and its growth nurtured only by the continual creation of new songs. The usual way in which a songwriter brings his songs to the public is through a music publisher. The writer and the publisher enter into an agreement substantially in the form of Exhibit "A" attached hereto, and it is standard for the writer to receive fifty percent of the mechanical-license fees collected by the publisher.

Section 25

The publisher promotes and exploits the song for the purpose of getting it recorded by a recording artist. If the publisher is successful in this endeavor, he

applies for a copyright on the song, usually in conjunction with the initial recording, and thereby becomes entitled to receive a royalty fee of two cents for each and every mechanical reproduction of all subsequent recordings of that song pursuant to the compulsory license provision of the Copyright Act. However, in lieu of the statutory rights afforded by this Act, it has, through necessity, become the common practice of the independent publishers to enter into a so-called negotiated or private licensing agreement with the record companies substantially in the form of Exhibit "B" attached hereto.

Section 26

The defendants are the major producers of first class phonograph records and other mechanical reproductions of sound recordings used both publicly and privately by the consuming public for listening entertainment purposes. By virtue of this position, the defendants establish the policies and procedures which are implemented throughout the industry as standard industry practice.

Section 27

The defendants have absolute control over all aspects of sound recordings produced by their companies, including which songs get recorded, the recording artist and musicians used, the technical personnel and recording facilities, and ultimately the release, distribution, promotion and sale of the product. These products of the defendants are advertised and distributed throughout the United States, and abroad, and are sold in virtually every community in this nation and extensively in foreign countries.

Section 28

The defendants are in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1), by entering into and carrying out contracts, combinations or conspiracies effectuating an undue, unreasonable and direct restraint of trade and commerce with regard to the production, reproduction and sale of sound recordings of copyrighted songs, including, among other things, the matters more specifically described hereinafter.

Section 29

Beginning many years ago and continuing up to this date, the defendants have engaged in the unlawful concerted activity of refusing to contract with the plaintiffs and members of their class under the terms of the compulsory license provision of the Copyright Act of 1909 (17 U.S.C. Section 1(3)). This Act provides, among other things, that once a copyrighted musical composition has been performed, or recorded, ". . . any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; . . ." The defendants, through their control over the recording and the mechanical reproduction and sale of phonograph records, have circumvented this statutory provision afforded to plaintiffs and the class in the great majority of cases by refusing to record a song unless the copyright owner enters into a private licensing agreement, substantially similar to Exhibit "B" hereto. The so-called private licensing agreement reduces the royalty fee to a maximum of two-thirds of the statutory amount and imposes a further limitation on the number of units to be paid on, from the number "manufactured" to the number "manufactured and sold."

Section 30

In order to do business with the defendants, the plaintiffs and their class must agree to be relegated to royalty fees of less than the amount provided by law as aforesaid, notwithstanding that the statutory provision was enacted in 1909, and since that time the cost of living has greatly increased and the average retail price paid for a phonograph record has increased an even greater amount. Moreover, in the past few years these defendants, along with other phonograph record companies not made parties hereto, have purchased, established or otherwise acquired extensive holdings in music publishing companies whose operations are in direct competition with the plaintiffs and their class. In addition to having to compete in the publishing business with the publishing companies owned or controlled by defendants, plaintiffs allege and verily believe that the defendants do not impose upon their own companies these same financial restraints of reduced royalty fees.

Section 31

Defendants have individually as well as collectively refused to obtain compulsory licenses from the music publisher members of this class except upon the contract terms described herein, and each of the defendants knows that the others systematically refuse to do so. As a result of this concerted activity with tacit understanding among the defendants, they have suppressed competition between publisher members of the plaintiffs' class and publishers owned or controlled by defendants, and consequently have unlawfully restrained trade and commerce with regard to all plaintiffs and the class, have suppressed and restrained the songwriter members of this class in their creative activities, and have restrained plaintiffs and the class from realizing the full potential value of their copyrighted songs and have thus deprived the public of access to and the enjoyment of many other songs in many cases.

Section 35

For further cause of action, plaintiffs and the class allege that defendants are in violation of Section 2 of the Sherman Act (15 U.S.C. Section 2) by attempting to monopolize and by monopolizing the music industry with regard to the production, manufacture and sale of phonograph records and other sound recordings of copyrighted musical compositions.

Section 36

Defendants and their subsidiaries produce approximately 65% of all phonograph records and an undetermined amount of other types of sound recordings which are sold throughout the United States and abroad. In addition, defendants, either directly or through subsidiary or associated companies, own music publishing companies which control a significant percentage of the copyrighted musical compositions which are recorded and released on phonograph records and other types of sound recordings. Because of this ownership structure, defendants possess and exercise the power to restrict, eliminate and exclude competition from plaintiffs and the class.

Section 37

In order for plaintiffs and the class to get songs recorded by the defendant record companies, the quality and appeal of the songs have to be very greatly superior to any songs in the catalogs of defendants' publishing companies. Consequently, thousands of otherwise marketable original songs remain in the files of plaintiffs and the class, idle, unrecorded and never offered for sale to the consuming public, thereby denying plaintiffs and the class the opportunity to get any compensation whatsoever from their works. On the other hand, on the exceptional occasions when a promising composition is accepted, recorded and sold, the financial returns to plaintiffs and the class have been substantial.

Section 38

In each of the numerous instances, both writers and publishers, in plaintiffs class have been compelled to enter agreements for split royalties with defendants publishers and agents in order to get their songs recorded. Even with this arrangement, the defendants only rarely spend as much money in the promotional effort of these songs as the songs in which they have the exclusive publishing rights.

Section 43

Among the common instances where plaintiffs and the class are paid less than the contract rate are on the sales of phonograph records through record clubs. This is usually accomplished through a sublicensing arrangement between the respective defendants and the record clubs. On the total number of units sold in this manner, the copyright owner gets paid at the rate of only seventy-five percent of the contract rate. The contract rate is, in a majority of the cases, set at 1½ cents per copy rather than the 2 cents provided by statute, and this 1½ cent rate is arbitrarily factored down to seventy-five percent of that amount, or 1.125 cents. Club sales account for a significant portion of total record sales and are usually sold at the same price as retail sales through any other retail outlet. Also, this same manner of arbitrarily reducing the contract royalty rate is practiced by the defendants in sales of records to military post exchanges. Plaintiffs and the class are paid no royalties at all on records that the defendants account for as being returned and/or scrapped, but most of which are usually

eventually sold at discount prices or are given away free of charge as bonus records in order to promote other records unrelated to plaintiffs and the class.

[Subsequent to the hearing the following letter and attachments were received for the record from Alan I. Wally.]

EAST WINDSOR, N.J., *July 22, 1975.*

Representative ROBERT KASTENMEIER,
House of Representatives
Washington, D.C.

DEAR MR. KASTENMEIER: First, I would like to thank you very much for allowing us the opportunity to present our views on the anti-piracy provisions of the General Copyright Revision Bill.

Pursuant to our conversation I am enclosing a copy of the October 5, 1974 issue of Billboard Magazine where I got the quote that I used in testimony. Unfortunately, this reference library has a terrible Xerox machine so I apologize for its fuzziness.

You indicated to me that you would make a special effort to read my paper in its entirety. I am sure that after reading it you can see why I did not want to go no with Mr. Gramuglia or Mr. Heilman as I had a completely different point of view than they did. Nevertheless, our own end goal happens to be the same—mandatory licensing.

In reviewing this Xerox copy it seems that last year you indicated to Rep. John Conyers and Rep. John Seiberling that in this current session of Congress there would be in-depth hearings by the Sub-Committee with reference to the public interest and anti-trust aspects involved in the way the record industry functions under copyright revision.

One of the things I specifically asked for in my paper was an economic impact survey which would demonstrate conspiracy, collusion, price fixing, structural anti-trust, restraint of trade, violations of the Sherman & Clayton Anti-Trust Act, etc.

I am positive if you will allow the Justice Department to use some of the points which I have raised as a guideline you will find that everything I have said in my paper is true and that some form of modification of the anti-piracy provisions, specifically compulsory licensing after 15 months, would give the major labels exactly what they are asking for but would then effectively protect the artists, the retailer and the consumer.

It is absolutely imperative that compulsory licensing carry a provision that the artists be given the exact same royalty payments that they get from the record companies. This would allow the artists to get royalties in perpetuity as against the average 16 weeks the artists currently receive royalties for now. But, compulsory licensing to take effect is months after release of record which is 9 months after 99.5% of all records come off charts, are no longer being produced by major labels [so they can't lose] and artists no longer getting royalties.

There are 15,000 jobs at stake no one loses and everyone gains.

During the course of testimony I stated that the consumers would benefit from compulsory licensing. You asked me if there were any consumer groups that I could cite that would be willing to come forward and testify.

I live in a development that has 14,000 people in it. Our Food Co-Op Committee started exactly as a food co-op committee. However, although it is still called a food co-op committee it is also a consumer watch-dog group.

Would you like me to have the president of that committee write to testify in regards to the above issue for a consumer point of view?

Respectfully yours,

ALAN I. WALLY.

HOUSE GROUP OKS ANTIPIRACY ACTION

(By Mildred Hall)

WASHINGTON—The House Judiciary Committee last week approved the anti-piracy bill, H.R. 13364 with the milder prison terms of one and two years maximum for first and repeated offenses respectively. The bill carries maximum fines of $25,000 for a first offender and $50,000 for repeaters.

At the same time, Rep. Robert W. Kastenmeier (D., Wis.), author of the bill and chairman of the House Copyrights Subcommittee, has promised that this and all other aspects of the functioning of the record industry under the copy-

right law—from antipiracy to performance rights—will be given an in-depth exploration during 1975 hearings on the general revision bill.

The Senate Copyrights Subcommittee has sent word that it will go along with the milder prison terms in the House bill. This will avoid conference delays and speed action on the legislation needed to make protection of copyrighted recordings a permanent part of the federal copyright law.

The recently passed Senate antipiracy bill, like its revision bill, proposed maximum prison sentences of three and seven years (Billboard, Sept. 21).

The House Judiciary Committee vote was 30 to 2 on the Kastenmeier antipiracy bill. Rep. Robert Drinan (D., Mass.), the chief dissenter, made his customary attack on the record industry for alleged monopoly practices. He said that record companies should be given exclusive ownership for only five years, with mandatory licensing to tape duplicators after that period.

Rep. Drinan argued that the tape duplicators could serve the public by lowering prices, and providing reissues of non-hit or older recordings, also benefiting performers and music licensees. He said big record companies and their record clubs dominate the industry and "authors and performers lose."

His argument brought questions from Reps. John Conyers (D., Mich.) and John Seiberling (D., Ohio). They asked whether the House revision hearings next year would cover the public interest and any antitrust aspects involved, in the way the record industry will function under the copyright revision.

Rep. Kastenmeier assured fellow members of the Judiciary Committee that there would be in-depth hearings by his subcommittee. Justice Department will be asked for comment not only from its Criminal Division (on the record piracy question), but also from the Anti-Trust Division on any monopoly aspects.

"The public interest in copyright, beyond the owners and user groups, needs to be considered in depth" he said.

But Rep. Kastenmeier demolished much of Rep. Drinan's tape duplicator argument by pointing out that unauthorized tape duplicators who do a $300 million a year business do not make copies of out-of-press or non-hit recordings, or of "finer works" that do not become hits. The pirates siphon off the top hits while they are at the head of the popularity charts.

To Rep. Drinan's contention that performing artists "don't understand the copyright law," Rep. Kastenmeier said today's artists and their representatives are "highly sophisticated" about the law. Many form their own recording and publishing companies. "If any performers and composers felt they were disadvantaged by the law, they would have testified at House hearings in 1965 on the revision bill, and 1971 and 1974 hearings on the House antipiracy bills."

Finally, Rep. Kastenmeier pointed out that the Constitution itself—like it or not—has deliberately assured a monopoly for copyright owners for limited periods of time, in order to provide incentive to produce further works. Wholesale pirating kills that incentive.

Rep. Kastenmeier hopes for an early vote on the antipiracy bill. He will also hold hearings on the interim Senate bills which were passed by that body, since the House cannot act on a revision bill this year.

One would extend expiring copyrights for two years, and another would establish a commission to study new technological uses of copyrighted materials. An individual Senate antipiracy bill was included, but the House will vote on its own H.R. 13364.

Rep. Kastenmeier is not personally in favor of extending the expiring copyrights for another two years, but says he will go along with the majority, if the other members of his subcommittee feel it is beneficial.

Mr. KASTENMEIER. Thank you, Mr. Wally.

Mr. Gramuglia.

Mr. GRAMUGLIA. Thank you, Mr. Chairman. I would first like if possible to have "The Great American Rip-Off" put in as part of the record, if that is possible.

Mr. KASTENMEIER. This is a piece by Mike Terranova?

Mr. GRAMUGLIA. That is correct.

Mr. KASTENMEIER. And it is related to this question. Without objection, this will be received and made a part of the record at this point.

Mr. GRAMUGLIA. Thank you.

[The material referred to follows:]


THE GREAT AMERICAN
Rip-Off
RCA
THE UNITED STATES
HOUSE OF
REPRESENTATIVES
COPYRIGHT
REVISION BILL
No. HR-2223
CBS
POLYGRAM
ABC

INTRODUCTION

My name is Mike Terranova. I am a private citizen and the chief spokesman for the Independant Record and Tape Association, the national association which represents the small recording companies of America.

My Association is deeply concerned over the possible passage of the proposed House copyright revision bill. We are amazed that the House of Representatives is considering a bill that will enable the multi-billion dollar music conglomerate to reap unconscionable and immoral profits, all at the expense of the consumer and the small recording companies.

I am certain that you and your fellow congressmen are not aware of the enormous impact that these music companies have on the individual citizens of this country. Music is something mankind has needed and enjoyed since the beginning of his existence. To enable the complete control of this music to fall in the hands of these few giant conglomerates, who have, and shall continue in the future, to rape and plunder mankind of his need for music, is indeed a crime of major status.

We have prepared this pamphlet with its various proposals to help you choose an alternative to the proposed House copyright revision bill which, if passed into law will entrench and federally protect these shameless corporate giants.

PROPOSAL FOR A SOUND RECORDING

COMPULSORY LICENSING LAW

The purpose of this first proposal is to eliminate the power that is created by the control of all the major popular sound recordings by a mere handful.

We propose that in lieu of the 28-year renewable copyrights for sound recordings, said copyright should be a non-renewable 28-year copyright. This would be more consistent with the reasoning behind a renewable copyright as found in the House of Representatives report #2222, 60th Congress, 2nd Session, page 14.

During the course of the first 5-year term of this copyright, in order to assure continuing creation of new recordings, the owner of same shall have the sole and exclusive copyright. However, if, at the end of said 5-year period the owner of said copyright has sold in excess of 500,000 copies, he should be compelled to make said recording available to anyone for the purpose of licensing same. Although, if the conditions are met, the owner must make said recording available for licensing after 5 years, he may license out said recording at anytime prior thereto if he so desires. This 5-year exclusive copyright will permit a copyright owner to recoup his original investment for a promotion, etc., and realize a profit, (no recording company can validly claim it has not made a substantial profit after the sale of 500,000 copies of any one recording) and at the same time permit the small company to purchase a license for copying said recording.

Keep in mind that if 500,000 copies are not sold by the copyright owner, he would not be compelled to license same. In addition, even if he does sell 500,000 copies, he still has the exclusive right to license same for the full copyright period of 28 years. In other words, the large record companies, as well as the small record companies, would both be realizing a profit under this licensing system. Of course, the copyright owner should not be permitted to charge exhorbitant or unconscionable prices for licensing, and a reasonable range of prices could be set by the legislature. Such legislation should also provide that a certain percentage of the licensing fees be paid directly to the artists themselves. Under the current "licensing only by contract" situation, the artist usually receives no compensation when his recording is licensed out. In addition, he also receives nothing when his recording is sold for less than the normal wholesale catalog price. This situation usually occurs within two years of the original release. And, this cannot be denied by the major music conglomerates, since their contracts with recording artists so provide.

I am aware that the large recording companies argue that compulsory licensing would hurt the small recording companies, and I must concede that strict compulsory licensing would hurt the small companies. However, compulsory licensing only after sale of 500,000 copies, as proposed here, would not only protect the small record companies who rarely sell over 500,000 copies, but also increase competition by making the same popular good-selling records and tapes available to the consumer not only at different prices but from different companies.

You should also be informed that it is presently impossible for the consumer to buy certain old and out-dated recordings such as those of the big band era, Gene Autry, Roy Rogers and such, merely because these aforesaid large companies have decided that it would be economically unfeasible to distribute any additional recordings of same on a national basis. However, if licenses for these so-called "old and outdated" recordings were sold to a smaller company, it might well be economically feasible for said company to distribute such recordings to consumers in their local area profitably. In addition, they may be able to sell them at lower prices than the large companies.

Many people ask why compulsory licensing for sound recordings and not for written material? In answer, we can offer various reasons but there are three which are more compelling than the others. Firstly, the demand for a particular sound recording is created by constant bombardment on radio and television, whereas one doesn't read a book before he purchases same. Secondly, the music itself is already protected by a copyright and said copyright will eventually expire, causing the work to become in the public domain, but when a small company goes out of business without licensing out any of its sound recordings, these master recordings are lost in oblivion, never to be heard again by the public. Of course, as aforesaid, the large companies are by choice depriving the public of purchasing certain old recordings such as Caruso, Roy Rogers, etc., and are in fact hoarding the master recordings of these and many other artists. If said masters are destroyed the public will never again hear these sounds. Finally, the most compelling reason is that all the major popular recordings in existence today are controlled by a mere six giant music conglomerates, and such is not the case with control of copyrighted written material. Thus, the sound recording is intrinsically different from a written novel and for the reasons aforesaid, the owners of said recordings should be compelled to license same according to any reasonable criteria such as that hereinbefore set forth.

SECOND PROPOSAL

THE MUSIC PUBLISHING MONOPOLY

Our second proposal is to deal with the increasing monopoly that is being created today in the music publishing industry. You should be informed that one powerful organization, Electrical Musical Industries, herein referred to as EMI, represents or owns 40% of all the major musical compositions throughout the world. This is a staggering and appalling figure!

The recently passed extension for the expiring musical copyright is more than "a rip off on the public" as stated by Rep. John Dingell (D.-Michigan). It is legal rape of the American comsumers. It is hard to believe that the Congress of the United States can be fooled into believing that this will actually benefit the writers and composers. The only people to profit from such a situation are the major publishing companies, not the deserving writers, who have long been deceased. In addition, these large companies also argue that the United States will be more in alignment with the copyright laws which are presently enforced in Europe. This argument is, at best, questionable. After reviewing the situation in various countries, it should be asked, does the United States really want to follow the strict and exclusive copyright laws enforced in Europe? These laws were written by European aristocrats to protect themselves, with no concern for the common people.

In Germany, for instance, it is mandatory that all blank tapes sold for consumer use have a copyright royalty paid on them, in addition to the retail cost. This is nothing more than an added security tax for benefit of the music publishers who assume that if a person buys a blank tape, he will be recording copyrighted music on it. Also, in the United Kingdom, as another example, it is illegal for a consumer to record records or tapes for his own personal use. Is such a monopoly over the recording of musical compositions what you really want for your fellow Americans?

We propose that you should not legalize a copyright period exceeding 28 years, but including one renewal for a 28-year period. However, this second 28-year period should consist of a renewal policy allowing the said copyright to be renewed only by its author or composer. Furthermore, all of the royalties that would have to be paid after the initial 28-year copyright should be mandated to be paid exclusively and directly to the author and/or composer. Under the present system a profitable copyright is picked up and renewed by the publisher or recording company without renegotiation with the author or composer or his estate. Thus, the music publishers are depriving not only today's authors and composers, but also their families and heirs, of deserved royalties.

In addition, we proposed that instead of a fixed statutory rate with an indepen-tribunal to determine cost of living increases, the copyright royalty rate should

be a fixed statutory percentage of the retail price. The benefits from such a proposal are numerous, but we shall explore the three major ones.

Firstly, and most importantly, is the improvement it will provide for the music buying consumer. A fixed statutory percentage will help to maintain the cost of recordings at their present levels or possibly even manage to lower them. Secondly, if the giant music conglomerates choose to raise their retail prices, they are then forced to pay a higher rate to the deserving authors and composers of the said recordings. Consequently, if they do raise their prices due to a rise in the cost of living, the authors and composers will then equally share in the additional revenue. Finally, this will help prevent the present situation which enables the large recording companies to pay only 25 to 50% of the statutory rate, while the smaller recording companies are paying the full rate. This 25 to 50% of the rate is obtained by large recording companies because of the control of the music publishing industry by such giant companies as the aforementioned EMI, and such reduced rate is one of the advantages commensurate with such control.

Moreover, this control enables bigger companies to keep the smaller recording companies paying the full rate. However, with our percentage proposal, the smaller companies may choose to sell their product at a lower price enabling them to better compete against the larger companies, with a lower royalty rate.

In conclusion, these proposals will allow the authors and composers, their heirs and distributees, to reap their just reward for their work without the necessity of raping the American public.

THIRD PROPOSAL

STATUTORILY MANDATED AIR PLAY

Our third proposal will be the most effective in breaking the stranglehold of the corporate giants in the music industry. We propose that the Federal Government should make it mandatory that local radio stations play a certain proportion of locally produced music. This could easily be enforced by the F. C. C. which already has jurisdiction over all radio stations. The power of the giants lies in their ability to obtain air play of their music. The demand for a particular piece of music is a direct result of its air play. The more the people hear it, the more they want it! Because of the current situation with the large conglomerates controlling the air play in the U. S., said conglomerates necessarily control the demand.

This "air play sound" monopoly could be broken if local radio stations were required by law to play local music. Television stations were recently mandated by Federal Law to include one-half hour of local programming during "prime time" hours, and recently enacted legislation in Canada directed radio stations to play on the air at least 50% locally produced music.

The effect of such legislation on the grass roots economy is obvious--local recording companies would get badly needed exposure as well as local groups, artists, composers and musicians. Indeed, air play is the only manner in which a sound recording gets "exposed" to the consumer. Moreover, small grass roots artists, composers and recording companies are not able to get adequate exposure under the present system, due to their total inability to pay the promotion fees demanded by the large conglomerates. However, once the "locals" are heard on the air, a demand for said "locals" could be created and, as a consequence, the locally owned small recording companies would be encouraged to promote local talent. In a very short while, more small companies would be formed, and thus the market would be divided and not wholly owned, and controlled by the large monopolies. In these times of inflation, recession and unemployment, such legislation could possibly provide a sorely needed boost to numerous local economies.

There is another benefit to such statutorily mandated air play and one which should not be overlooked as we approach the bicentennial of our great land of equal opportunity. Once again, the poor, small-time, local artist would have an equal chance at making it to the top. Yes, the all-important air exposure could be had without prostituting one's self and, in effect, selling one's soul to the large conglomerates, and probably becoming involved in payola and drugs.

POWER STRUCTURE OF A MUSIC CONGLOMERATE

The following is a list of the recording companies and music publishing companies that are owned or controlled by Electrical Musical Industries, EMI which is traded on the New York Stock Exchange, and its affiliates.

CAPITOL RECORDS, INC.

Labels Owned:
*Capitol *Melodiya/Angel
*Angel *Seraphim *Longeness
Labels Distributed:
*Apple *Island *Shelter
*Harvest (U. K.) *Mango

MCA RECORDS, INC.

Labels Owned:
*MCA *Kapp *Coral
*Decca *UNI *Vocation
Labels Distributed:
*Rocket *Track
*Sounds of the South

DECCA RECORD CO. LTD.

Labels Owned:
*Ace of Clubs *Decca *Qualiton(Whales)
*Ace of Diamonds *Decca Phase 4
*Rex *Ace of Hearts *Deram
*Sugar *Argo *Eclipse *Telefunken
*Boltona *London *Threshold
*Brunswick *London Globe *Dafodil
*L Oiseau Lyre
Labels Distributed:
*Chapter One *MCA *M & M
*Emerald *York *UK *Mam
*Emerald Gem *Greenwich Gramophone Co.
Labels Represented:
*Boot *Flamingo *Platinum *GNP
*Brunswick *Scepter *Challenge *HI
*Starday *Crescendo *Hickory *UNI
*Turnabout *Commodore *Jamie
*Coral *Laurie *Vox *Decca
*Ovation *Wand (All USA)

LONDON RECORDS, INC.

Labels Owned:
*Deram *Parrot *London
*Phase 4 *Stereo Treasury Series
*Richmond Opera Series
Labels Distributed:
*Ashley *HI *Threshold *UK
*Chapter One *High Country *Mam

ABKCO INDUSTRIES, INC.

Labels Owned:
*Cameo *Parkway
Administered Companies:
*Apple Music Publ'g Co. (ASCAP)
*Harrisong Music, Inc. (BMI)
*Ono Music Inc. (BMI)
*Startling Music, Inc. (BMI)

Page 2 -

EMI RECORDS, London, England

Labels Owned:
- *Capitol *Parlophone *EMI
- *Classics for Pleasure *Rhino
- *Regal Zonophone *Columbia
- *Double-Up *Starline *Encore
- *State Side *HMV *Harvest
- *Music for Pleasure *One-Up
- *Talisman *Waverly World Record Club

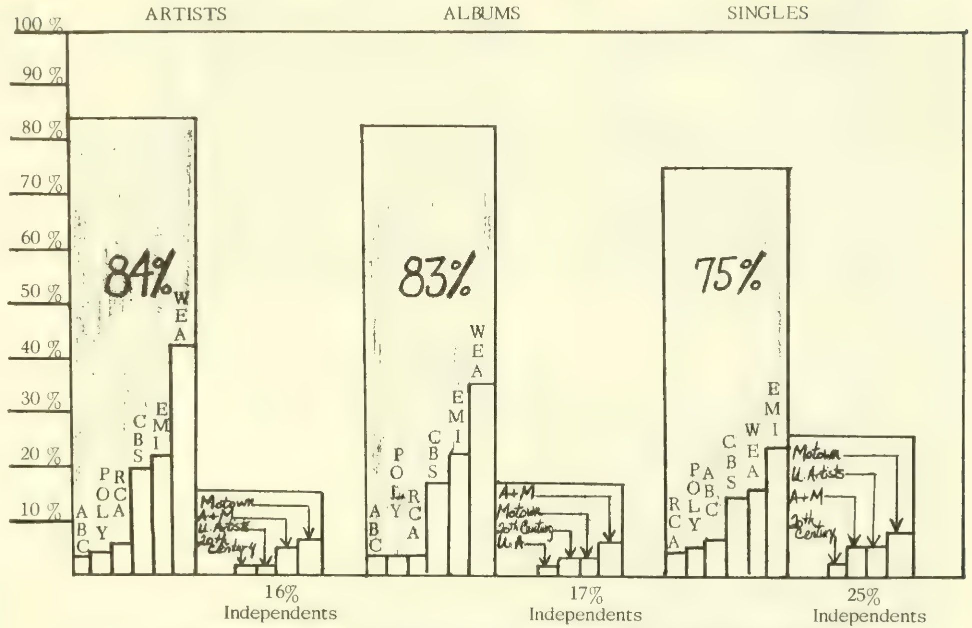
Labels Distributed:
- *Alaska *Dragon *Ashanti
- *Granada *Avalanche *B & C
- *Bell *Blue Mountain *Bronze
- *Bus Stop *Cactus *Charisma
- *Chrysalis *Immediate *Instant
- *Island *Sunset *Trojan *Virgin
- *United Artists *Village Thing

Labels Represented:
- *Ammo *Asylum *Command
- *Dot *Famous *Fantasy *Probe
- *Green Bottle *Hot Wax *Impulse
- *Invictus *Mowest *Neighborhood
- *Paramount *Purple *Rare Earth
- *Signpost *Sovereign *Wizard
- *Tamla/Motown *Tumble Weeds

EMI Music Publishers Owned:

- *Affiliated Music Publishers Ltd.
- *B. Feldman & Co. Ltd.
- *Francis Day & Hunter Publ'g Ltd.
- *Keith Prowse Music Publ'g. Co.
- *Robbins Music Co.
- *Al Gallico Music Corp.
- *Castle Music PTy. Corp.
- *Donna Music Ltd.
- *Edicoes Musicans Itaipu LTDA
- *Edition Accord
- *Editions Feldman S. A. R. I.
- *Editions Francis-Day SRL
- *Editorial Musical Odeon
- *Editorial Musicali Francis-Day SRL
- *Edizoni Musicali La Voice Del Padrone SRI
- *Ego Musical SA
- *Francis-Day & Hunter Scandinavia A/S
- *Francis-Day Muziekuitgavers N. V.
- *Ardmore & Beechwood Ltd.
- *Ardmore & Beechwood (S. A.)(PTY) Ltd.
- *Arion Greek Music Co. Ltd.
- *Beechwood De Mexico S. A. De C. V.
- *Beechwood Music Corporation
- *Beechwood Music of Canada
- *Francis-Day (S. A.)(PTY) Ltd.
- *Les Editions Et Productions Musicale Pathe-Marconi
- *Muzietkuitgeverij "Trident" NY
- *Pathe Publications (Far East) Ltd.
- *Publications Francis-Day
- *S. A. Ardmore & Beechwood Belgium
- *Sochiem LTDA
- *The Peter Maurice Music Co. Ltd.
- *Toshiba Music Publ'g Co. Ltd.
- *Anagon N. V.

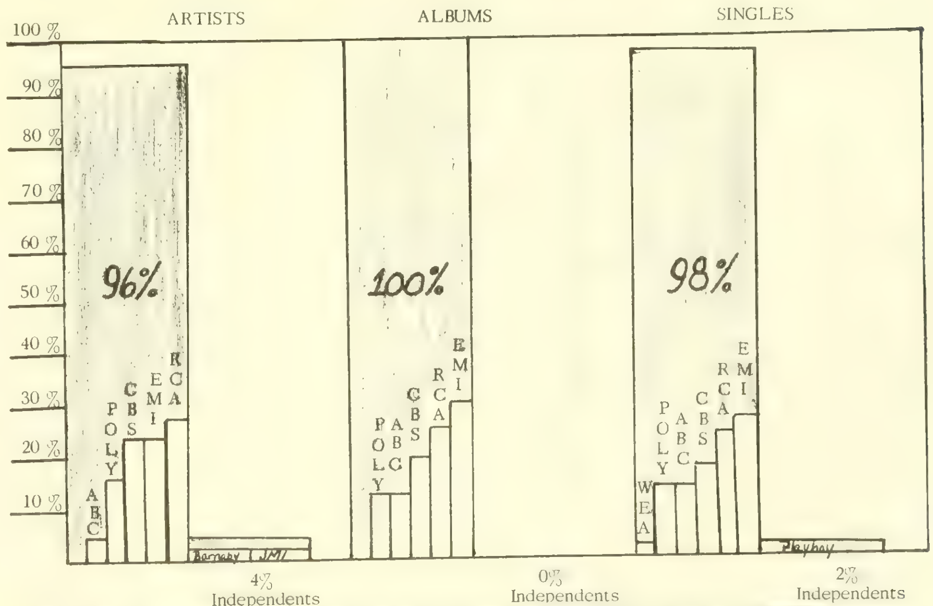
THIS GRAPH SHOWS THE PERCENTAGE OF CONTROL OF THE 100 MOST POPULAR ARTISTS, ALBUMS, AND SINGLES IN 1974 BY THE MAJOR CONGLOMERATES. *



Four of the Independents, A&M, Motown, 20th Century, and United Artists control 69% of the Independent's share of artists, 71% of Independent's share of albums and 68% of the Independent's share of singles.

* Source: Billboard, "Talent In Action", December 28, 1974

THIS GRAPH SHOWS THE PERCENTAGE OF CONTROL OF THE 50 MOST POPULAR COUNTRY ARTISTS, ALBUMS, AND SINGLES IN 1974 BY THE MAJOR CONGLOMERATES*



"POLY" - Polygram Corp. (Labels Owned Includes: MGM, Phillips, Mercury Records)
"EMI" - Electrical Musical Industries (Labels Owned Includes: Capitol, MCA, Decca, London)
"WEA" - Warner/Elektra/Atlantic Corp. (Labels Owned Includes: Asylum, Atco, Reprise)
"CBS" - Columbia Broadcasting Systems (Labels Owned Includes: Columbia, Epic, Harmony)
"RCA" - Radio Corporation of America (Labels Owned Includes: NBC, Victor, Red Seal, Camden)
"ABC" - American Broadcasting Corporation (Labels Owned Includes: Dunhill, Dot, Famous)

*Source: Billboard, "Talent In Action", December 28, 1974

This Pamplet Published By:

THE INDEPENDENT RECORD & TAPE

ASSOCIATION OF AMERICA

P. O. Box 120

Swanton, Vermont 05488

Mr. GRAMUGLIA. My name is Thomas Gramuglia. I have been asked to speak to you on behalf of the Independent Record and Tape Association of America, the national association which represents the small recording companies of America. When I say small recording companies, I mean companies that actually hire their own performers, musicians, and artists, and produce their own record.

The testimony I will give you today is in support of the proposed changes that IRTAA has outlined in their pamphlet, "The Great American Rip-Off." When the IRTAA formulated their pamphlet, they assumed that the enactment of copyright legislation by Congress under the Constitution is not based upon any natural right that the author has to his writings. The Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and the progress of science and useful arts will be promoted. Copyright is not primarily for the benefit of the author, but primarily for the benefit of the public.

When we read section 114 of bill No. 2223 dealing with sound recording copyrights, we ask ourselves two questions, and possibly two questions that you should ask yourselves. First, how much will the legislation stimulate the producer and so benefit the public? Second, how much will the monopoly granted be detrimental to the public?

The answer to the first question is very disturbing. Ever since the introduction of a sound recording copyright in 1971, the number of new recordings being made available to the public has actually declined.

While the number of new recordings has declined, the dollar sales figures have increased because of the constant increasing cost of each recording to the public. The sound copyright as written has failed to stimulate the producers into producing more creations for society to enjoy.

This sound copyright monopoly is a failure. It has only managed to increase the cost to the consumer and decrease his choice.

Our proposals on a compulsory license of sound recordings will correct this appalling situation. With this compulsory license, the present industry monopoly will be broken, opening new channels of distribution and thus creating new incentives for smaller recording companies such as my own to create new recorded material.

In addition to spurring new creators, it will also help stop the illegal price-fixing practices that exist in the recording industry. I would like to remind you that the suggested retail prices from different manufacturers of sound recordings are exactly the same throughout the United States. In fact, retail stores don't have to stamp prices on albums unless there is a special sale. They merely stamp on the album a letter from "A" through "E" which indicates the price category that certain album falls into.

Compulsory licensing will also, in addition, help stop other harms. Because of the present restraint of free competition, there has necessarily been a reduction in quality. Oftentime, the consumer has been unable to obtain a cassette tape when he desired one, finding only an eight-track available. Likewise, when 33⅓ and 45 RPM records were introduced, 78 RPM discs of the desired renditions were suddenly unavailable. There is also no denying that persons who bought four-

track tape machines a very few years ago are now able to purchase little or nothing to play on them since eight-track tapes are almost exclusively available.

In the future, one can see in the absence of an open marketplace that quadrophonic recordings may become the exclusive product, thus causing the record buying public to invest in new and expensive reproduction equipment.

Let us now please turn to the section of the musical compositions of the copyright bill. The part which disturbs IRTAA most of all is the section on page 21, line 21. "A person may not obtain a compulsory license for use of a work in the duplication of a sound recording made by another."

Will this condition for a compulsory license stimulate the producer and so benefit the public? Of course not. Small recording companies such as my company will record a rendition with the hope that they may be able to license out to smaller companies to market in their local areas. This is done to share the production costs. The above condition would halt such practices and thus decrease the availability of new renditions to the public.

A record company could not license anyone without the permission of the musical copyright holder. The big companies would be forced into buying the last remaining independent publishers to protect their recordings from domination, while companies like Polygram and E.M.I., who have extensive copyright holdings, would have indirect control of vast amounts of sound recordings. It makes no sense at all. It encourages monopolies and stifles creativity.

We also disagree with the length of copyright for musical compositions of life plus 50 years. It is much too long. This long period of copyright will not stimulate more producers. When an author is dead, financial awards are of little value. This long period will only stifle creativity because music publishers who have successful copyrights will continue to promote those successful ones, while having little interest in obtaining new ones. Recording companies such as E.M.I. and Polygram, who have extensive copyright holdings, will push their performers in recording materials from their own sources. The longer the copyright, the bigger the sources will be.

The term should be kept at the present length of 28 years plus 28 years with only one exception. The second 28 years should only be renewable by the author or composer himself. This way, if the publishing company has cheated him, he can renegotiate a new contract with a new publishing company.

Finally, please remember our proposals have been designed with the welfare of the public in mind, with safeguards for the authors and performers to insure them an adequate return for their talents.

Your support of these proposals, as I discussed, will advance the useful arts for the benefit of society, and will not allow copyright as bill No. 2223 is written, to be used as a tool to exploit mankind for the benefit of a few greedstricken corporate giants.

Thank you.

Mr. KASTENMEIER. Thank you.

[The prepared statement of Mr. Gramuglia follows:]

STATEMENT OF THOMAS GRAMUGLIA, SPOKESMAN, INDEPENDENT RECORD & TAPE ASSOCIATION OF AMERICA

My name is Thomas Gramuglia. I have been asked to speak to you on behalf of the Independent Record & Tape Association of America, the national association which represents the small recording companies of America.

The testimony I will give to you today is in support of the proposal changes that the IRTAA has outlined in their pamphlet, "The Great American Rip-Off". When the IRTAA formulated their pamphlet, they assumed that the enactment of copyright legislation by Congress under the Constitution is not based upon any natural right that the author has in his writings. The Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and the progress of science and useful arts will be promoted. Copyright is not primarily for the benefit of the author, but primarily for the benefit of the public.

When we read Section 114 of Bill #2223 dealing with sound recording copyrights, we ask ourselves two questions: First, how much will the legislation stimulate the producer and so benefit the public? Second, how much will the monopoly granted be detrimental to the public?

The answer to the first question is very disturbing. Ever since the introduction of a sound recording copyright in 1971, the number of new recordings being made available to the public has actually declined!

While the number of new recordings has declined, the dollar sales figure have increased because of the constant increasing cost of each recording to the public. The sound copyright as written has failed to stimulate the producers into producing more creations for society to enjoy.

This sound copyright monopoly is a failure! It has only managed to increase the cost to the consumer and decrease his choice. Hence, the answer to the second question is that the sound copyright as written is very damaging to the public, and does not confer a benefit upon the public that outweighs the evils.

Our proposals on a compulsory license of sound recordings will correct this appalling situation. With this compulsory license, the present industry monopoly will be broken, opening new channels of distribution and thus creating new incentives for smaller recording companies to record new material.

In addition to spurring new creations, it will also help stop the illegal price-fixing practices that exist in the recording industry. The suggested retail prices from different manufacturers of sound recording are exactly the same throughout the United States! In fact, retail stores don't have to stamp prices on albums unless there is a special sale. They merely stamp on the album a letter from "A" through "E" which indicates the price category that certain album falls into.

Compulsory licensing will also in addition help stop other harms. Because of the present restraint of free competition, there has necessarily been a reduction in quality. Oftentime, the consumer has been unable to obtain a cassette tape when he desired one, finding only an eight-track available. Likewise, when 33½ and 45 RPM records were introduced, 78 RPM discs of the desired renditions were suddenly unavailable. There is also no denying that persons who bought 4-track tape machines a very few years ago are now able to purchase little or nothing to play on them since 8-track tapes are almost exclusively available.

In the future, one can see in the absence of an open market place that quadrophonic recordings may become the exclusive product, thus causing the record buying public to invest in new and expensive reproduction equipment.

By the same token, it is well known that traditionally the manufacturers of sound recordings have chosen to include in their products many pieces which they had every reason to suspect would not be successful. By tying these pieces with those for which they do anticipate success, the manufacturers have successfully increased the amount which the consumer must pay to obtain that which he desires. As you can see, society is the constant loser!

Let us now please turn to the section of the musical compositions of the copyright bill. The part which disturbs the IRTAA most of all is the section on page 21, line 21. "A person may not obtain a compulsory license for use of a work in the duplication of a sound recording made by another."

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A record company could not license anyone without the permission of the musical copyright holder. The big companies would be forced into buying the last remaining independent publishers to protect their recordings from domination, while companies like Polygram and E.M.I., who have extensive copyright holdings, would have indirect control of vast amounts of sound recordings. It makes no sense at all. It encourages monopolies and stifles creativity.

We also disagree with the length of copyright for musical compositions of life plus 50 years. It is much too long. This long period of copyright will not stimulate more producers. When an author is dead, financial rewards are of little value. This long period will only stifle creativity because musical publishers who have successful copyrights will continue to promote those successful ones, while having little interests in obtaining new ones. Recording companies such as E.M.I. and Polygram, who have extensive copyright holdings, will push their performers in recording materials from their own sources. The longer the copyright, the bigger these sources will be.

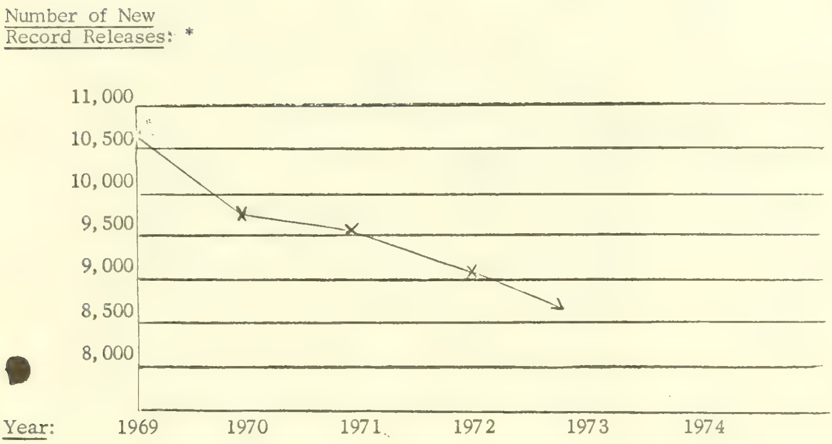
The term should be kept at the present length of 28 years plus 28 years with only one exception. The second 28 years should only be renewable by the author or composer himself. This way, if the publishing company has cheated him, he can renegotiate a new contract with a new publishing company.

Finally, please remember our proposals have been designed with the welfare of the public in mind, with safeguard for the authors and performers to insure them an adequate return for their talents.

Your support of these proposals, as I discussed, will advance the useful arts for the benefit of society, and will not allow copyright as Bill #2223 is written, to be used as a tool to exploit mankind for the benefit of a few greed-stricken corporate giants.

Thank you.

THIS CHART SHOWS HOW THE SOUND COPYRIGHT
HAS FAILED TO STIMULATE NEW CREATIONS.



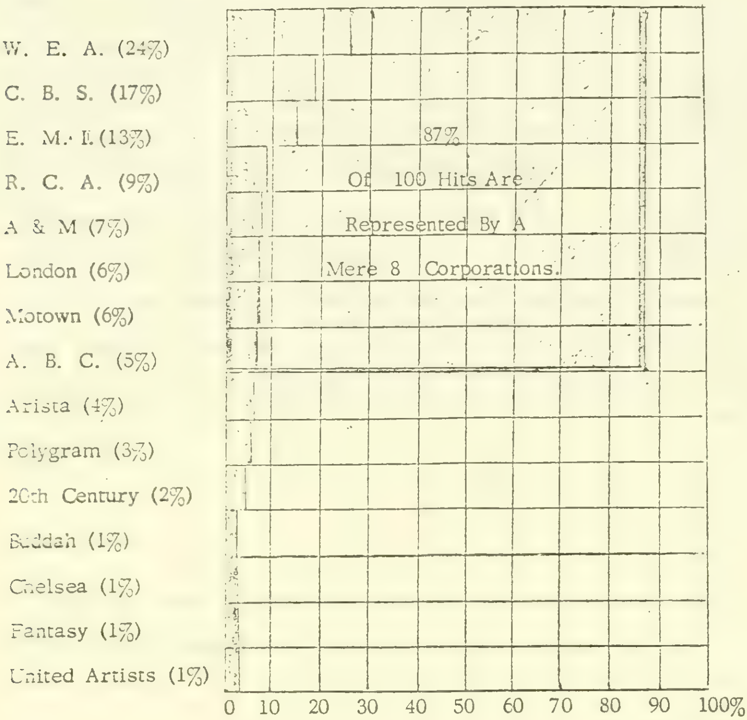
1973 and 1974 new record releases have shown a decline, however the exact figures from the RIAA are still unavailable at this time.**

Source:

*' Billboard's Buyer's Guide, September 22, 1973.

** Billboard, February 1, 1975, page 3.

Billboard Chart - TOP LP'S AND TAPES - For the Week Ending July 12, 1975



NOTE:

1. All A & M records and tapes are exclusively manufactured by CBS Records.
2. London & Motown have a distribution pack.
3. United Artists & Polygram have a joint distribution pack also.
4. Fantasy, Motown, ABC/Dot are all handled exclusively by E.M.I. in all markets outside of the U.S. and Canada.

Mr. KASTENMEIER. Do all three of you represent compatible interests? I say that because, Mr. Gramuglia, you represent a group of small recording companies, which in part or in whole record their own music, so to speak.

Mr. GRAMUGLIA. That is correct.

Mr. KASTENMEIER. While I think, Mr. Heilman, you are not precisely in that——

Mr. HEILMAN. No; EC Tape does no manufacturing at all. We only develop compilations and we market by year from 1929 forward through 1971 and rather than sell by any particular artist, we market the years as you would have bottled wine, the top 16 or the top 32 or the 64 songs of that particular year, which would interest you the most in the category of music that would interest you the most.

Mr. KASTENMEIER. And you believe that that is legal?

Mr. HEILMAN. Absolutely, sir. We are the only company ever to come out with a library program of music designed for 17 years and the only place we could advertise our product and sell it was by national mail order and you will note that we do not sell any tapes for a dollar because of our legal fees that we have incurred and because of the tremendous costs of advertising. We sell our 8-track tapes for $6.98, or $5.77. We are probably the only company in the United States to be in an unfair competition suit for being slightly higher than the original producer of old music.

Mr. KASTENMEIER. One other question—one question I had was you indicate that it is in the consumer's interest that the law be modified such as you have recommended to the committee.

Mr. WALLY. Absolutely.

Mr. KASTENMEIER. I am wondering what evidence you have of that. When I say what evidence, are there consumer groups that you can cite?

Mr. WALLY. I am a retailer and I think I can answer that.

Mr. KASTENMEIER. OK. Are there consumer groups that you can cite that would urge this committee to take the course of action you recommend so that they would be benefited as consumers of popular music?

Mr. WALLY. Well, there is Ralph Nader's group, but may I also recommend an economic impact survey, which will show what I am about to say as being factual, and again, as a retailer, I deal with the public and I am also echoing the thoughts of other retailers that I represent.

To begin with, there is one quote that was made that I think will clear up a lot of things, Mr. Chariman, and it is a very unfortunate quote. You were quoted in "Billboard" as saying, and again, I want to tell you—tie everything together, and I think you will understand what I am talking about—I want to quote both yourself and Mr. Danielson.

You were quoted as saying something to the effect of pirates and duplicators being one and the same thing, and that was in the October 5, 1974, issue of "Billboard" magazine. You were saying duplicators do not make copies of out-of-press or nonhit recordings or works that don't become hits. Pirates siphon off the top. I direct this at you. You can take a look at Mr. Heilman's list or here is one from U.S. Tape, not available in the stores. Take a look at "Billboard" magazine, which I will hold up—"Top 200"—you take the total number of weeks

each is on the chart and you will come out with the average life on the chart which is something like 16 weeks. That is No. 2.

Mr. KASTENMEIER. Incidentally, do you have the original "Billboard" magazine before you that you are citing from?

Mr. WALLY. I will give you several of them. I will even show you how the mathematics are done. Here is one of the top-100 tapes. If you like, I will give you a couple of others. If you take a look at week No. 1——

Mr. KASTENMEIER. I am referring to the quotation.

Mr. WALLY. Oh, no; that I don't have.

Mr. KASTENMEIER. That is what you should have.

Mr. WALLY. October 5, 1974.

Mr. KASTENMEIER. You are purporting to quote us. You ought to have——

Mr. WALLY. No; I just took that out of the library. This is current and recent. The average life on the charts is something like 16 weeks.

Now, if I can quote Representative Danielson, he said something to the effect, I believe copyright is to promote the arts. Now——

Mr. KASTENMEIER. The question I asked a few minutes ago——

Mr. WALLY. Let me——

Mr. KASTENMEIER. No; you are not answering it. The question I asked was, "What consumer groups, if any, are you aware of that will take your position?"

Mr. WALLY. Ralph Nader's group. But, let me——

Mr. KASTENMEIER. Well, Ralph Nader, I would like to inform you, was invited by this committee to testify, not just in connection with your situation, but generally, and declined to do so.

Mr. WALLY. But, can't the retailers speak for the consumer as the consumer is our customer?

Mr. KASTENMEIER. The retailers cannot, in my estimation, speak for anybody other than the retailers.

Mr. WALLY. Because I just want to say that 90 percent of what is currently on the charts today will not be available 2 years from now, just as 90 to 95 percent of what was on the charts 2 years ago is not available in any retail store today, and if you want, I will spend time with any of your legislative aides or whoever they are and shop the stores and point out lists that I have. The idea is the artist makes money, or should make money, on royalties, and if he is not being produced by the record companies, I don't see how the record companies can holler and say, hey, we are losing money to a duplicator, when they are not making the product. The artist is not getting royalties and the consumer has something that he wants.

Mr. KASTENMEIER. The question the Chair was posing, and it was not posed in a hostile fashion, because I suspect that you possibly could make the case that consumers are injured—I don't know that you can, but I think maybe it is possible—but one way of doing it, it would seem to me, is to interest consumer groups in the point of view you are expressing and I have asked merely whether you have interested any consumer groups in the point of view that records are not available for less money now because of the copyright law. It would probably—I think it would help your point of view if you were able to do so.

Mr. HEILMAN. Mr. Kastenmeier——

Mr. KASTENMEIER. Yes, Mr. Heilman.

Mr. HEILMAN. Two years ago, the music industry was attempting to pass a bill in the State of Wisconsin. We went to St. Norbert's College and in 3 days I think enrollment in Green Bay, Wis.—in 3 days, we had 800 signatures out of a possible 3,400 people on campus. It is an amazing thing. What has happened here, the music industry has walked in—they walked into the courts, walked in to you gentlemen, and said this is a piracy case and all of a sudden everybody forgets about the basics of laws and basics of business and the practicalities. It is very difficult when I contact an organization and say I represent a duplicator, because automatically they say, oh, you are a record pirate, and it makes it very, very difficult really to talk to them.

But, I would say this. In the Senate hearings in 1967, a lady by the name of Isobel Marks, who was a member of the New York Bar, and she was assistant secretary of Decca Records since 1934, told the Senate Committee that hit records have a life of 12 weeks. They go on the charts, they stay on the charts for a few weeks, and the money has to be paid within a 6-month period.

Well, the record companies got protection from all hits after February 15, 1972, forward. They have absolutely no competition on the new music because no one can copy it because of the Federal penalties. And yet, they go back now and go back for at least 40 years in music, music that they have no interest in producing. They want complete control of that music, because some day, instead of 10 percent or 15 percent of their business being in old music, it might turn out to be 50 percent of the business, if the public's attitudes change. They have a complete lockup on an industry larger than all sports combined in America and yet from a practical side, I don't believe this committee has ever realized that a writer of a song takes that song to a publisher and when he signs that contract, that writer loses all rights that he has. Any moneys that are sent to the publisher, the publisher has complete control over. Whatever he retains, he then sends the money to the author. The author has been slighted.

The author—I have tendered over $150,000 to publishers, possibly $200,000. Less than $50,000 was ever accepted by publishers. They turned down hundreds of thousands of dollars last year, thereby depriving the author and composer.

Mr. KASTENMEIER. My time has expired. I will yield to the gentleman.

Mr. DANIELSON. I want to ask a question before you get onto another subject.

Understand something. You understand what you are talking about intimately. We do not. Now, explain what you mean that you sent $150,000 in and they turned down all except $50,000. Explain that.

Mr. HEILMAN. OK. Mr. Danielson, under the compulsory license provision, if you make use of it, you must tender 2 cents each time you manufacture that song. If you will look at my catalog, each of my tapes has 16 songs on it. So, that means for each musical composition, 16 times 2 cents I must tender 32 cents to the people who control those copyrights. So each time I record it, I send 32 cents to the publisher. Now, there can be 16 separate publishers. He takes the 32 cents. Let's assume one publisher owns all 16 songs. He keeps 16 cents for himself and he ships to the writers 16 cents. All of a sudden, since the music

companies have gained control of those publishers, they have—the publishers refuse the money. Thereby the author and composer——

Mr. DANIELSON. Wait a minute. Since the music companies have obtained control of the publishers——

Mr. HEILMAN. That is correct.

Mr. DANIELSON. Two different entities?

Mr. HEILMAN. Right.

Mr. DANIELSON. Explain the difference.

Mr. HEILMAN. OK. There is a manufacturing company, such as CBS.

Mr. DANIELSON. They are the ones who press the record.

Mr. HEILMAN. Right. And they have the performers.

Mr. DANIELSON. All right. Who is the publisher?

Mr. HEILMAN. The publisher is the man who presents them with the music. The writer, who wrote the song, takes it to a publisher. The publisher goes out and promotes it to a record company. Then, the publisher and the record companies have a meeting of the minds. They say, I will give you the performer, you give me the song. Many times they exercise a copublishing contract.

Mr. DANIELSON. You send them 32 cents.

Mr. HEILMAN. To the publisher.

Mr. DANIELSON. Go ahead.

Mr. HEILMAN. What has happened today is that these publishers have refused the money. Out of 154 separate publishing houses in the United States, 127 publishing houses refused my money; 27 did accept. Now, the 127 publishing houses that may encompass as many as 500, 1,000, 2,000 authors, they have deprived those authors of that money due them under the compulsory license, and yet you don't see one author come to you and say what has happened.

Mr. DANIELSON. You went from first to third, without touching second. What happens—you send them the 32 cents.

Mr. HEILMAN. Right.

Mr. DANIELSON. What is the next thing?

Mr. HEILMAN. They don't do anything with it.

Mr. DANIELSON. They must do something.

Mr. HEILMAN. They don't cash the checks. They just hold them or—they don't hold them, don't do anything.

Mr. DANIELSON. Do they send any communication of any kind?

Mr. HEILMAN. Yes.

Mr. DANIELSON. You skipped that. Tell us about it.

Mr. HEILMAN. Through their license agent, Harry Fox, they will send a music form saying based on the 1972 Dutchess Case, they don't have to send the money, and it is a violation to tender payment under compulsory license.

Mr. DANIELSON. Do they cash the check?

Mr. HEILMAN. No, they don't.

Mr. DANIELSON. Do they return the check?

Mr. HEILMAN. No, they don't.

Mr. DANIELSON. As far as you know, the check is still sitting in their till.

Mr. HEILMAN. That is right.

Mr. DANIELSON. You see, you didn't tell the whole story. You say over what period of time did you send this money in?

Mr. HEILMAN. Starting in 19——

Mr. DANIELSON. Approximately.

Mr. HEILMAN. September 1972 through May of 1975.

Mr. DANIELSON. OK. You have got 2½ years, 2¾ years. How much did you send in and how much was cashed?

Mr. HEILMAN. All right, sir. I don't have the exact——

Mr. DANIELSON. Give me ball park figures.

Mr. HEILMAN. Let's say it is a $300,000 figure. I said $50,000 earlier. I would say about $75,000 was cashed.

Mr. DANIELSON. About $225,000 uncashed.

Mr. HEILMAN. That is correct.

Mr. DANIELSON. That is what—I just wanted to get the size. Thank you.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. If you were—one of you was involved in actually producing records.

Mr. GRAMUGLIA. That is right. We are a New York record company in Massina, N.Y.

Mr. PATTISON. You employ performers.

Mr. GRAMUGLIA. That is right. Correct.

Mr. PATTISON. You make a tape or record from that.

Mr. GRAMUGLIA. Yes.

Mr. PATTISON. Whenever you did that, if the song has previously been published, you send in the 2 cents.

Mr. GRAMUGLIA. That is right. We don't have the problems as Dave Heilman has. They accept our 2 cents. They accept our 2 cents, but the problem is that in this bill there is section 115, where it says a person may not obtain a compulsory license in the use of a work in duplication of a sound recording made by another. We have a small studio in Massena, and you can imagine how small that is, because you are from New York. We are in the middle of nowhere, with a population of about 10,000 people. For us to produce a recording in Massena, N.Y., we actually can't sell much there, so therefore we produce in Massena, and we license a guy out in Michigan or——

Mr. DANIELSON. Speak into the mike.

Mr. GRAMUGLIA. We will license a person in Michigan or license a person in Georgia to share the actual production costs, but if this bill passes with that clause that we cannot obtain a compulsory license in use for duplication of a work by another, the person that we license in Georgia would not be able to obtain a compulsory license to reproduce our sound recording.

Mr. DANIELSON. Mr. Chairman, I hate to take all the time, but I have got a couple of more questions.

Mr. KASTENMEIER. If the gentleman from New York will yield. He has the time.

Mr. PATTISON. I yield.

Mr. DANIELSON. If you send in $300,000 and realize this is a ballpark figure, nobody is holding you to it, are you sort of in the right area there? Are you talking about $300,000 or $30,000 or——

Mr. HEILMAN. Let's say there are 600,000 pieces produced. Let's say, and it is difficult—I would say anywhere from $200,000 to $300,000.

Mr. DANIELSON. Up in six digits.

Mr. HEILMAN. Right.

Mr. DANIELSON. Let's take $300,000 at 2 cents. That is 15 million tunes.

Mr. HEILMAN. Each tape has 16 songs on it.

Mr. DANIELSON. That is all right, but it is still 15 million tunes played once. Each constitutes 2 cents.

Mr. HEILMAN. Right.

Mr. DANIELSON. 16. Very nearly a million tapes. Not quite. I was trying to get at the size of the business, Mr. Chairman. For $300,000 at 2 cents for each tune, you come to 15 million recordings of a tune, counting each recording as one, no matter how many times you did it. That is an awful lot of tunes, a lot of recordings, anyway.

Now, that money—when you record on your equipment, let's say it is one of these cartridges, you have a bookkeeping system whereby you know that you have recorded "My Wild Irish Rose."

Mr. HEILMAN. Right. We know X amount of numbers each year has been produced and from that there are 16 songs in that particular year.

Mr. DANIELSON. But, you do keep track of the number of times you record a given selection?

Mr. HEILMAN. That is correct, sir.

Mr. DANIELSON. And you then remit periodically. How often do you make your remittances?

Mr. HEILMAN. Every 20 days.

Mr. DANIELSON. Every 20 days approximately you remit to the copyright holder.

Mr. HEILMAN. Which is the publisher.

Mr. DANIELSON. The 2 cents per tune.

Mr. HEILMAN. That is correct, sir.

Mr. DANIELSON. You know, as a matter of common knowledge, I guess, within your business that out of 2 cents, a penny goes to the publisher and a penny is supposed to go to the composers.

Mr. HEILMAN. Yes; but it is sent directly to the publishers, never sent directly to the composers.

Mr. DANIELSON. You send it to the publisher, but out of that 2 cents, he keeps 1 and then sends 1 on, theoretically at least.

Mr. HEILMAN. That is right.

Mr. DANIELSON. Now, out of that $300,000, then, they accepted roughly $100,000 of which, of course, $50,000 went on to the various composers and $50,000 remained with the publisher.

Mr. HEILMAN. If that is the figure we used, supposedly, yes.

Mr. DANIELSON. I am using it only as an example. But, $200,000 did not get accepted and therefore one-half of it was not retained by them and one-half was not forwarded on to the owner of the—the composer, owner of the copyright.

Mr. HEILMAN. That is correct.

Mr. DANIELSON. The creator of the selection. Now, then, you do not, I gather—it is implicit in your statement that when you do make recordings, you never overlook the requirement of sending this 2 cents on to the publisher.

Mr. HEILMAN. Absolutely not, sir.

Mr. DANIELSON. Do you know whether within related businesses to yours, there are those who make the recordings, duplicate the tapes, but fail to send the 2 cents on?

Mr. HEILMAN. Yes, sir. Any tape or record being sold in the United States that purports to be a duplicated tape that is selling retail at $1, it is absolutely utterly impossible to pay, if he has 16 songs on it, 32 cents, pay a manufacturing company approximately 50 cents. It is impossible.

Mr. DANIELSON. You make your statement inferentially. You know there are tapes which are sold at a price which would not permit the inclusion of the record royalty?

Mr. HEILMAN. That is correct.

Mr. DANIELSON. And from that fact, you infer they must be doing it without observing the copyright royalty.

Mr. HEILMAN. That is right.

Mr. GRAMUGLIA. I would like to make a point. One of our fiercest competitions is major label cutouts. No royalty is paid at all to the composer or publishing company.

Mr. DANIELSON. What is a cutout?

Mr. GRAMUGLIA. Once a record plays the 16 weeks that it is on the chart and it becomes no longer sellable at the full retail price of $6.98 or $5.98, they delete it from their catalog and sell it to schlock dealers. Schlock dealers sell it off at a lower price, exactly what you would have in a discount house, like a Woolworth's.

Mr. DANIELSON. What do they do, remove the——

Mr. GRAMUGLIA. No.

Mr. WALLY. Mr. Congressman——

Mr. DANIELSON. One at a time.

Mr. GRAMUGLIA. What they usually do is punch a hole in the record and delete it.

Mr. DANIELSON. Deleted means removed.

Mr. GRAMUGLIA. From the——

Mr. DANIELSON. No record.

Mr. GRAMUGLIA. Deleted from the actual catalog of the manufacturer. Once it is deleted from the catalog of the manufacturing company, it is then sold at a lower than the normal wholesale price. Anything that is sold for a lower than the normal wholesale price, no royalties are paid either to the artist or the composer.

Mr. DANIELSON. Now, the manufacturer of that record was the publisher; isn't that right?

Mr. GRAMUGLIA. No; the manufacturer of the record is the record company.

Mr. DANIELSON. I see. In other words, the publisher turns a record over to a record company which manufactures it. He presses the actual record.

Mr. GRAMUGLIA. No; you are mistaken. A publishing company is a company that owns the rights to the written musical composition. A record company is the company that hires the performers and musicians to sing that or perform that musical composition and then markets the records.

Mr. DANIELSON. They make the impression on a vinyl disc, or some such.

Mr. GRAMUGLIA. Right. They will go into the recording studio.

Mr. DANIELSON. That is a record company.

Mr. GRAMUGLIA. They will go into the studio.

Mr. DANIELSON. I am trying to find out who these people are. That is the record company.

Mr. Danielson. The record company, after the 16 weeks of preferred market are gone, he punches a hole in the record and sells it through some discount house. Is that the idea?

Mr. Gramuglia. That is what usually happens.

Mr. Danielson. Where do they punch the holes? The only holes I see in the record are in the middle.

Mr. Wally. I think I should explain.

Mr. Danielson. You see, you are using a lot of jargon which means something to you but doesn't mean anything to me, but it is not going to mean anything else.

Mr. Wally. Mr. Danielson. The term "cutout" and I would like to refer to page 2 of—the term "cutout", if in the past the retailer had guaranteed sales, he would buy a record or tape and at the end of a season or at the end of a run, the retailer got full credit. In others words, if I buy a tape from RCA, I pay them, let us say, $4.25.

Once it goes off the charts, I can then return it to RCA for $4.25 credit. They then want to get rid of, let us say, 20,000 or 30,000 excess tapes that they have and they will sell it at fire-sale prices. What is to prevent an individual like myself from saying to, I think it is Mr. Gramuglia, what is to prevent me from saying, Hey, Mr. Gramuglia, you buy the tape at fire-sale prices, bring it down to my basement, and I am going to holler to RCA, look at what I find in my basement. You owe me $4.25.

So, what they do is make a cutout, a generic term. If you have ever seen a record album on sale, a corner of the jacket is cut out at an angle or on an 8-track tape, a little hole, a tiny hole is drilled into the side over here, or else a burr mark is run across. This signifies to everybody that this tape is a final-sale tape.

Mr. Danielson. In other words, it has gone through its prime marketing period and it is now being sold at a discount.

Mr. Wally. Right, but once this item becomes a cutout, at that point, and this is, I think, germane to the entire situation here, the artists do not get royalties. Under some of the legislation——

Mr. Danielson. Does the publisher get any royalty?

Mr. Wally. No, sir.

Mr. Danielson. All right. I have got you now.

Mr. Wally. This is what we want to propose.

Mr. Danielson. Once it is cut out, got the corner clipped off the jacket or a hole or a burr mark in the case, then royalties cease on that item.

Mr. Wally. Right. Now, this is what is the interesting fact, or one of the facts. Once RCA, let us say, gets rid of all of their titles on that cutout, that is it. It will never appear again unless something unusual happens and a group becomes so strong that they revive that group and that is very rare.

What we are saying and I am saying as a retailer and these gentlemen are saying, we are all leading to the same thing. Hey, the artist is entitled to make money. How many artists are around that were around 5 years ago? There are very few Elvis Presleys and Frank Sinatras. He is entitled to make as much money as he can in his productive years, but after 16 weeks, he is no longer paid. A year from now, what happens if somebody wants to bring out a song that was

very nice or very beautiful? We want to promote the arts. Well, it is no longer available, but if we do it and we pay royalties on it, who loses? The record——

Mr. DANIELSON. I think what you are saying is that sometimes there are duplicators who will take a "cutout" and re-record that and have it available for sale.

Mr. GRAMUGLIA. Yes; for instance, like——

Mr. DANIELSON. When I was a young man, there was a tune named "Sylvia" that you don't even remember. Let's assume it is a cutout. If somebody wants "Sylvia" would you re-record it and in the event you did, you would look up somewhere and find out that that—the copyright belongs to Mr. "J"?

Mr. GRAMUGLIA. And we would pay him a royalty.

Mr. DANIELSON. You would send him the 2 cents.

Mr. GRAMUGLIA. Right. But, under our proposal for compulsory license for sound recordings, we would not only pay the copyrighter but also the performer that sang the song, John Smith. We would send him a royalty and the record company a royalty. The royalty would be split. Just like the royalty is split now for the publishing company 50–50, the royalty for the sound recording would also be split.

Mr. DANIELSON. I think I understand what you mean. We have got two things. We have got the duplicating in which the duplicators are willing to pay the royalty and you have got the duplications in which the need for royalties is being circumvented. That is what I would call true piracy.

Mr. HEILMAN. It was my understanding when Public Law 92–140 was passed, you added a criminal section to section 104 to make it a misdemeanor for failure to pay the compulsory license. The ninth, tenth and fifth circuits, two-to-one divisions on a three-judge court, have said that similar is not identical, so a duplicator, even though he pays the money, he is actually making an identical use, rather than a similar use, because if he made a similar use that means, well, if he makes an identical use, he is just copying something, but as I pointed out, I could not get performances for Judy Garland's greatest hits. I could pay $100,000 for them, and then when I go to the people that own the underlying works based on the new court decisions, they could say I want a half million dollars for the words of that music or say no. They have complete control.

Mr. DANIELSON. You used another two words I would like to have you distinguish, "similar" and "identical."

Mr. HEILMAN. The compulsory license says once you acquiesce to mechanical reproduction, once the publisher allows it to be reproduced mechanically, any other person may make similar use of that work. For years and years it was thought simply pay the payment of 2 cents to the publishers and you could record the work.

Mr. DANIELSON. What is the difference between that? Why does "similar" change from "identical"?

Mr. HEILMAN. The courts have said similar is not identical. Assuming that I take Maurice Chevalier and I copy the 1929 version of "Louise" by Maurice Chevalier, I say I didn't go out and get him and bring him to a studio and have him record that song. All I did was copy it from an old 78. So, therefore, I am making an identical use of

that composition and the compulsory license says similar use. But——

Mr. DANIELSON. I see your distinction now.

Mr. KASTENMEIER. The gentleman from New York's time has expired.

Mr. DANIELSON. My apologies.

Mr. KASTENMEIER. The gentleman from New York.

Mr. PATTISON. I would like to pursue one question with Mr. Gramuglia. You say that you produce in Massena, N.Y., a performance and you record it and you make a deal with somebody out in Minnesota or somewhere to manufacture that.

Mr. GRAMUGLIA. In Massena, N.Y., we actually manufacture our own.

Mr. PATTISON. You make a deal with somebody to split the costs?

Mr. GRAMUGLIA. Right.

Mr. PATTISON. Your partner?

Mr. GRAMUGLIA. Not a partner.

Mr. PATTISON. What does he do with it?

Mr. GRAMUGLIA. He is a licensee. He takes the recording and manufactures it in Michigan or Georgia and sells on a local basis in Michigan or Georgia.

Mr. PATTISON. But, isn't the violation of the so-called antipiracy law—isn't that—isn't it up to you to complain? In other words, can't you consent to somebody else doing that?

Mr. GRAMUGLIA. I can consent. In other words, since our recording is copyrighted, I give him permission to record my recording. But if the present law is passed, 2223, in 2223, it says a person may not obtain a compulsory license for use of the duplication of a sound recording made by another. The gentleman in Georgia whom I license is making a duplication of my sound recording, so he is not entitled to a compulsory license. Even though he has gotten permission from me to make the duplication, he cannot make it, because the musical composition copyright holder does not have to give him a license.

A situation has happened in the State of Michigan where we licensed a gentleman from Michigan to do some of our recordings and he then turned around and went to the Harry Fox Agency and that agency said, "We will not give you a license. We want an advance from you before we will give you a license."

In the copyright law, there is no such thing as an advance, but the reason they can ask for an advance is because of these court decisions that Mr. Heilman talked about. The man in Michigan is making an identical use of my recording since it is actually my recording, and he is not entitled to a compulsory license.

Mr. PATTISON. I think that is a problem that can be solved very readily. I think it is a question of language. I don't think that is the intent of the law.

Let me pursue a different question. The question on this matter of the copyright owner not getting the 2-cent royalty after a certain time after you have done a cutout from it. Isn't it true that you pay the 2 cents for every tape that you—for everyone that——

Mr. GRAMUGLIA. I——

Mr. PATTISON. Wait a minute. I haven't finished my question. I don't think you can answer it.

Is it the law that you pay 2 cents for every record that you sell or manufacture?

Mr. GRAMUGLIA. No, the law that I have to work under, because I am not a large recording company, is that I have to pay 2 cents on each recording that is manufactured, but the large recording companies do not have a compulsory license. What they have is a negotiated license.

Mr. PATTISON. I understand. They are the first user.

Mr. GRAMUGLIA. Not always the first user. They don't have to be the first. They have got a standard clause contract and they get a lower rate.

Mr. PATTISON. They go to the owner of the copyright and they say, we will give you a cent and a half. They know they don't have to give any more than 2 cents, so they—if it is a big enough volume deal, it may be that the copyright holder will say, oh, OK, I will do it for 1½ cents. That is not under the compulsory license operation. I agree.

Mr. GRAMUGLIA. Right.

Mr. PATTISON. And they say we will give you a cent and a half for every tape that we manufacture, or they might even say for every tape that we sell.

Mr. HEILMAN. At full retail.

Mr. PATTISON. I understand, but that was their ideal. But, the point is, there is a case called the Selma case in Tennessee. Since the independent publishing companies have no power, in other words, if you are a small independent publishing company, it isn't like you are going to go to CBS and say, listen, man, you are going to pay me 2 cents. They will say forget it. We don't need you.

Mr. GRAMUGLIA. They had to submit to their will.

Mr. PATTISON. They have no choice. You say 2 cents. The only thing they don't have to say, they can say 1½ cents. They don't have to agree to that but the objection that was made——

Mr. GRAMUGLIA. But the court——

Mr. PATTISON. That the copyright holder does not get anything beyond the time when you have taken it off your list is an objection that has already been resolved by agreement between the copyright holder and the manufacturer. Isn't that correct? He has agreed. I am the owner of the copyright. I agree you are only going to pay——

Mr. GRAMUGLIA. The thing you don't understand, since the recording industry is only controlled by seven or eight corporations, they have no choice.

Mr. HEILMAN. They have no standing to sue. It is ruled that a composer goes into court demanding whatever money he has coming to him and the courts ruled since he allowed the publisher—he signed his contract away. He has no standing to sue. Now, sometimes in the American Met versus Warner Brothers, 389 Fed.——

Mr. PATTISON. You are telling me he sold his copyright, right?

Mr. HEILMAN. He allowed a publisher to handle for him his copyright.

Mr. PATTISON. For whatever he may have sold it, for $50 the whole thing.

Mr. HEILMAN. Right. But, let's say the publisher then denies—does not want to retain the money, money that I send. A copyright holder

goes into court to demand money from me. The courts rule he has no standing to sue.

Mr. PATTISON. All right. That is a problem of a copyright holder, not your problem, right?

Mr. HEILMAN. Right.

Mr. PATTISON. That is not something you can complain about.

Mr. HEILMAN. But they have bypassed the compulsory license.

One thing I want to mention. In the 1909 Copyright Law, Congress looked ahead and said the danger lies in the possibility that one company might secure by purchase or otherwise a large number of copyrights of the most popular music and by controlling these copyrights, monopolize the business of manufacturing, selling music, producing machines otherwise free to the world. That has happened today. It has happened to a business that is $2.2 billion, and, gentlemen, I submit to you that a thorough check of the copyright office will show you that the major record labels, their subsidiary publishing companies, are administering tremendous amounts of copyrighted compositions of other companies. They control both the underlying work and their performers and, gentlemen, something has to be done today.

Mr. WALLY. Mr. Pattison, there is just one thing I want to point out and reiterate. The idea of copyright is to protect an artist so he will continue to perform and by granting him this protection, it is expected that certain things will be kept in the public domain. Again, I repeat, there is a——

Mr. PATTISON. You are using a term there that is a term of art.

Mr. WALLY. A work of art.

Mr. PATTISON. When you say that the purpose of copyright is to put works in the public domain——

Mr. WALLY. Keep them there.

Mr. PATTISON. You use a bad term. It is to make a copyright work or works of art available to the public. Something that is in the public domain means that you no longer have a copyright interest in it, so it is a very—it would be very misleading to use that term.

Mr. WALLY. What I am trying to draw to is that these record companies, after 16 weeks, take it out of the public domain.

Mr. PATTISON. They take it out of circulation.

Mr. WALLY. Take it out of circulation, but nobody else can have access to it, pure and simple, and the one thing that——

Mr. PATTISON. It never has to go into circulation at all, you know. If I have a copyright on something, I can refuse to let anybody play it ever.

Mr. WALLY. From what I understand, the antipiracy bill was designed to protect the artist, retailer, and consumer. I fail to see how an artist is protected if he is not allowed to make money. If a recording company decides, hey, Charlie, that is it, and they are no longer publishing, what is the artist to do? How is he to get protection?

Do you know what they do overseas? The royalty rights for a domestic production, produced overseas, the artist gets half of the contract. This was produced in England, RCA, a Perry Como record. He is getting paid half of the royalties and they are selling it over here. That is how they are protecting the artist.

Here is Simon and Garfunkel. How do you like it when this goes to a record club? When it goes to a record club, you are only going to get

half the royalties. He signed his rights away, that is true, for a limited amount of money, but I still mean—you are going to protect the artist. Fine. The record companies want to protect the artist. How? By producing it overseas and paying him half the royalties and bringing it back to America? How do they protect him? By saying you can't forevermore earn money? How can you lose money? A duplication is for making something you don't make otherwise. I fail to understand that. It is beyond logic.

Mr. KASTENMEIER. The time of the gentleman from New York has again expired.

Mr. GRAMUGLIA. May I make one point at the end?

Mr. KASTENMEIER. In answer to a question raised?

Mr. GRAMUGLIA. Just one last point since I am really the only guy here that uses his own artists and performers to record their own material. The reason that I feel that the copyright bill, the sound copyright portion of the bill is such a failure, and you have to understand this, is the fact that the amount of new recordings being made available to the public is declining every single year. This year we are below the 1958 level. In 1958, there were more new sound recordings being made than there are made today. And the reason for it is because the industry—the distribution process, the way sound recordings are brought to the consumer, is a monopoly. Because of this monopoly, small recording companies like myself, can't get any place. We just can't break through this distribution network. We need some help. That is really it, and by helping us you help the small people.

Mr. KASTENMEIER. Thank you, Mr. Gramuglia, and Mr. Heilman and Mr. Wally, for your testimony today.

This concludes our hearings today. The next meeting on copyright will be next Wednesday morning, July 23, at 10 a.m. in this room on the subject of performance royalties. The subcommittee will also be meeting tomorrow on a different subject.

The subcommittee stands adjourned.

Mr. HEILMAN. Thank you very much, gentlemen.

[Whereupon at 3:20 p.m., the committee recessed, to reconvene at 10 a.m., on Wednesday, July 23, 1975.]

COPYRIGHT LAW REVISION

WEDNESDAY, JULY 23, 1975

House of Representatives,
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
of the Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:40 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Drinan, Pattison, and Railsback.

Also present: Herbert Fuchs, counsel, and Thomas E. Mooney, associate counsel.

Mr. Kastenmeier. The hearing will come to order.

I would like to express the regrets of the subcommittee at the delay in convening this morning. The House of Representatives had very compelling business on the House floor. We had our photograph taken.

Again I will state that we may be interrupted, but for quorum calls we will not recess. However, for votes, we shall. So we meet under those restraints.

This morning's copyright law revision hearing confronts the issue of whether copyright protection should be extended to original performances of recording artists and musicians and related contributions of record companies in the creation of sound recordings. Illustrative of an affirmative answer is H.R. 5345 introduced by our colleague from California, Mr. Danielson. In the Senate an identical measure, S. 1111, was introduced by Senator Scott of Pennsylvania.

Now, without objection, the Chair welcomes witnesses who favor adoption of a performance royalty. Among the witnesses we will be hearing in that connection are Mr. Sanford Wolff, executive secretary of the American Federation of Television and Radio Artists. He is accompanied by Mr. Henry Kaiser, general counsel of the American Federation of Musicians. Mr. Stanley Gortikov, president of the Recording Industry Association of America, Robert McGlotten, legislative representative of the AFL–CIO presenting a statement by Andrew Biemiller, who is the legislative director of that organization, Mr. John Hightower, member of the board of directors of the Associated Councils of the Arts, and Theo Bikel, president of the Actor's Equity Association.

First, Mr. Sanford Wolff. Incidentally, if there are, as I gather there are, about six representatives of the panel in behalf of the proposal, we would like to greet you all and have you all come forward.

Now I call on Mr. Wolff to make his presentation.

TESTIMONY OF SANFORD WOLFF, EXECUTIVE SECRETARY, AMERICAN FEDERATION OF TELEVISION & RADIO ARTISTS, ACCOMPANIED BY STANLEY M. GORTIKOV, PRESIDENT OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA; JACK GOLODNER, EXECUTIVE SECRETARY, COUNCIL OF AFL-CIO UNIONS FOR PROFESSIONAL EMPLOYEES; JOHN HIGHTOWER, MEMBER OF THE BOARD OF DIRECTORS OF THE ASSOCIATED COUNCILS OF THE ARTS; THEODORE BIKEL, PRESIDENT OF ACTORS EQUITY ASSOCIATION; AND JAMES FITZPATRICK, ARNOLD & PORTER, GENERAL COUNSEL, RECORDING INDUSTRY ASSOCIATION OF AMERICA

Mr. KASTENMEIER. Mr. Wolff.

Mr. WOLFF. Thank you, sir.

Mr. KASTENMEIER. We have your statement before us and we will accept it for the record. It is six pages long. You may want to present it in its original form. If you do not, we will be agreeable to having it appear in its printed form in the record.

Mr. WOLFF. Mr. Chairman, there are a few but not substantial changes that I will make as I make the presentation, with your permission.

Mr. KASTENMEIER. Surely.

[Mr. Wolff's prepared statement is as follows:]

STATEMENT OF SANFORD I. WOLFF, ON BEHALF OF THE AMERICAN FEDERATION OF MUSICIANS (AFL-CIO) AND THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (AFL-CIO)

My name is Sanford I. Wolff. I am the Chief Executive of the American Federation of Television and Radio Artists, AFL-CIO, the collective bargaining representative of all the singers you have heard or seen on radio, television and phonograph records.

Because of the unavoidable absence of Musicians' President Hal C. Davis, who is out of the country, I am privileged today to speak not only on behalf of the 30,000 actors, announcers, dancers, news correspondents and singers who constitute AFTRA, but also on behalf of some 330,000 members of the American Federation of Musicians.

I should like at this time to introduce my distinguished colleague, Mr. Henry Kaiser, who, as you may know, has for many years been General Counsel of the American Federation of Musicians.

My mission is to voice the common aspiration of all American performers that creative citizens at long last be granted copyright protection that would provide a small measure of participation in the revenues derived from the highly profitable exploitation of their recorded performances.

Mr. Chairman and distinguished members of this committee, the time for the relief we have been vigorously pursuing for some 40 years—the time for realizing the modicum of justice these artists so eminently deserve is now. It has been too long delayed!

Let me briefly recite some relevant history. In 1940 the Shotwell Committee, after three years of study, omitted recognition of performers' rights from a then proposed revision of the copyright law because, and I quote, "thought has not yet become crystalized on the subject . . . and no way could be found at the present time for reconciling the serious conflicts of interest arising in the field."

Twenty-one years later, in 1961, the Register of Copyrights, after many years of further intensive study, reported to Congress that the issues "have not yet crystalized" and that "detailed recommendations are being deferred pending further study."

And five years after that, in 1966, this Committee accurately and sympathetically summarized the arguments advanced on behalf of performing artists, and

acknowledged that "there was little direct response to those arguments" but, because of the then existing "concerted opposition," failed to accept our pleas specifically noting "the possibility of full consideration of the question by a future Congress."

We now have had eight more years of experience and we are pleased to report a significant melting away of that "concerted opposition." Unlike eight years ago, we now have total agreement between the performing artists and the recording industry.

Unlike eight years ago, we now have the unqualified support of the Register of Copyrights.

On top of that, we now enjoy the support of the current Administration. The National Endowment for the Arts, and other influential groups from whom you will hear.

In sum, the only real opposition is that of a powerful combination of commercial entrepreneurs enjoying public gifts of air-wave monopolies and prospering enormously on the uncompensated talents of our members, who—if I may be permitted the luxury of what is rapidly becoming a neoclassic expression—have the "Chutzpah" to insist upon perpetuating an unconscionable exploitation.

It is to me, and to the thousands I am privileged to speak for, unthinkable for that kind of opposition to carry any weight with the Congress of the United States.

The legislation being considered should present little indecision to you. Its morality presents no mind-boggling challenge. It must be obvious that using a person's labors and talents to enrich oneself without compensating that person is less than ethical. It is hard to believe that the validity of that statement is less than self-evident. If, at the same time one uses another person's work, without compensation, to fill his own purse, and to replace another person whose living was earned by providing the same service, then the practice becomes thoroughly indefensible.

It is a practice which creates unjust enrichment and unjust unemployment.

Not too many years ago broadcasters employed musicians and singers on a full-time basis. We called it staff. There was an orchestra and a small group of singers who provided the music that was broadcast. Those people worked in many ways and on a variety of programs. Some of us still remember, with considerable fondness, Toscanini and the NBC Orchestra and the Riders of the Purple Sage. Though perhaps at the opposite ends of the musical scale, these American musicians and singers were employed to provide popular programming features for the American listening audience. Maestro Toscanini and the Riders are no longer with us, but their recorded music remains and continues, without cost to the broadcasters, without compensation to their heirs, and competes unfairly for jobs needed by their talented successors.

A Martian would find it incredible that we appear here with hat in hand for the passage of this legislation. Where else in these United States does one have to beg to get paid for the use of his work when the users of his work acknowledge the value of the product and grow rich on it? This is madness—unfounded in logic, ethics or economics.

The performers I represent here make an obvious, ever-increasing contribution to the programming of radio and T.V. stations. Basic American fairness requires that they be recognized and compensated.

Please disabuse yourselves of the notion so widely cultivated by our opposition that the sales of records directly reflect the number of times the record is played on the air. Even accepting the arrogant premise that radio stations spend 75% of their air time out of eleemosynary concern for the record industry—and in disregard of their own profits—that notion is simply not true. Sales often suffer from over-exposure and overplay on radio. Simply put, why buy a record when you can hear it free?

Put out of your minds, too, the canard propagated by the broadcaster that artists grow rich because of record sales.

Present here today are men and women unknown to you. No Sinatra, Diana Ross, Elvis Presley, Johnny Cash or Fifth Dimension—No Perry Como, Kate Smith, or Johnny Mann here; but on the records made by those stars and played on radio stations throughout the land, these people present contributed their invaluable services—their performances were heard.

M. David Grupp, a professional drummer who for 62 years has played for symphonies, on network television, recordings, theatres, clubs—even weddings. Many of the thousands of records he has worked on are still being extensively

broadcast, and he has never received a penny from the radio stations who profit from his talent.

William Ackerman, born and raised in Nashville, has been making popular, country, and rock and roll recordings since 1960. At least 100 of the more than 5,000 recordings that Bill has made have gone over the million mark. He hears his product played on radio stations all over the country, but he is not paid for or consulted about the broadcast of his talents.

Ralph Mendelsohn's instrument is viola. He has been with the New York Philharmonic for twenty-three years. When he joined the orchestra in 1953, its musicians were able to augment their earnings by radio broadcast fees. Today the Philharmonic's music is still used on radio to an even greater extent, but it is recorded and Mr. Mendelsohn and the other members of the orchestra get nothing.

Louis Nunley of Nashville is probably the most recorded bass singer in the world. He's been a background singer since 1953, with thousands of records to his credit. Over 1500 of these have made the broadcast charts, and more than 200 made the top ten in radio play. Lou never received a penny for the broadcast of his records.

Lois Winter has been a successful classical and popular vocalist for twenty-five years. She has performed as a background singer for every kind of recording, literally from A to Z—beginning with the Ames Brothers to Jazz Fiddler Florian Zabach. Remember Mitch Miller's record, "The Yellow Rose of Texas"? Lois, who has a Master's Degree in music theory, got $16 for the initial session fee, and nothing for the thousands of subsequent radio plays of that record.

Lillian Clark, like Miss Winter, is a working singer living in New York. She began her career with the Clark Sisters, and has sung with such groups as the Skylarks. She and Miss Winter together have participated in thousands of New York recording sessions over a span of twenty-five years. Like the others, Miss Clark has received nothing for the radio plays of her work.

Shirlee Matthews is one of the busiest singers in Los Angeles, devoting a major portion of her time and talent to recordings. You hear her voice every morning on the radio as you drive to work, and every night as you drive home. Shirlee is in demand because her talent is unique, and her "sound" is popular. But she is not helped by use of her recordings by broadcasters. Indeed, overexposure may shorten the length of her career.

Ron Hicklin, also from Los Angeles, has a list of titles longer than my arm. He's sung with Frank Sinatra, Shirley Bassey, Carol Channing and Damita Jo. For his contribution to "Papa Loves Mambo" starring Perry Como, Ron got $18. Nothing for the countless replays for profit on the public airwaves.

These and thousands of their anonymous colleagues are the people who bring the incomparable joys of music to America and to a large extent bring America to the world.

These people and their colleagues are the indispensable source of the huge profits of the broadcasting industry.

It is our fervent plea that they be granted the recognition and compensation so long and so sadly overdue.

We are deeply appreciative for this opportunity.

Mr. Wolff. My name is Sanford Wolff. I am the chief executive of the American Federation of Television and Radio Artists, AFL–CIO, the collective bargaining representative of all the singers you have heard or seen on radio, television, and phonograph records.

Because of the unavoidable absence of Musicians' president, Hal C. Davis, who is necessarily out of the country, I am privileged today to speak not only on behalf of the 3,000 actors, announcers, dancers, news correspondents, and singers who constitute AFTRA, but also on behalf of some 330,000 members of the American Federation of Musicians.

I should like at this time to introduce my distinguished colleague, Mr. Henry Kaiser, who, as you may know, has for many years been general counsel of the American Federation of Musicians. Mr. Kaiser is here and will be happy to participate in any subsequent discussions.

My mission is to voice the common aspiration of all American performers that creative citizens at long last be granted copyright protection that would provide a small measure of participation in the revenues derived from the highly profitable exploitation of their recorded performances.

Mr. Chairman and members of this committee, the time for the relief we have been vigorously pursuing for some 40 years, the time for realizing the modicum of justice these artists so eminently deserve, is now. It has been too long delayed.

Let me briefly recite some relevant history. In 1940, the Shotwell committee, after 3 years of study, omitted recognition of performers' rights from a then-proposed revision of the copyright law because, and I quote, "thought has not yet become crystallized on the subject and no way could be found at the present time for reconciling the serious conflicts of interest arising in the field."

Twenty-one years later, in 1961, the Register of Copyrights, after many years of further intensive study, reported to Congress that the issues—and I quote—"have not yet crystalized" and that "detailed recommendations are being deferred pending further study."

And 5 years after that, in 1966, this committee accurately and sympathetically summarized the arguments advanced on behalf of performing artists, and acknowledged that "there was little direct response to those arguments" but, because of the then existing "concerted opposition," failed to accept our pleas specifically noting "the possibility of full consideration of the question by a future Congress."

We now have had 8 more years of experience and we are pleased to report a significant melting away of that "concerted opposition." Unlike 8 years ago, we now have total agreement between the performing artists and the recording industry.

Unlike 8 years ago, we now have the unqualified support of the Register of Copyrights.

On top of that, we now enjoy the support of the current administration, The National Endowment for the Arts, and other influential groups from whom you will hear.

In sum, the only real opposition is that of a powerful combination of commercial entrepreneurs enjoying public gifts of airwave monopolies and prospering enormously on the uncompensated talents of our members, who—if I may be permitted the luxury of what is rapidly becoming a neoclassic expression—have the "Chutzpah" to insist upon perpetuating an unconscionable exploitation.

It is to me, and to the thousands I am privileged to speak for, unthinkable for that kind of opposition to carry any weight with the Congress of the United States.

The legislation being considered should present little indecision to you. Its morality presents no mind-boggling challenge. It must be obvious that using a person's labors and talents to enrich oneself without compensating that person is less than ethical. It is hard to believe that the validity of that statement is less than self-evident. If, at the same time one uses another person's work, without compensation, to fill his own purse, and to replace another person whose living was earned by providing the same service, then the practice becomes thoroughly indefensible.

It is a practice which creates unjust enrichment and unjust unemployment.

Not too many years ago broadcasters employed musicians and singers on a full-time basis. We called it staff. There was an orchestra and a small group of singers who provided the music that was broadcast. Those people worked in many ways and on a variety of programs. Some of us still remember, with considerable fondness, maestro Toscanini and the NBC Orchestra and the Riders of the Purple Sage. Though perhaps at the opposite ends of the musical scale, these American musicians and singers were employed to provide popular programing features for the American listening audience. Maestro Toscanini and the Riders are no longer with us, but their recorded music remains and continues, without cost to the broadcasters, without compensation to their heirs, and that music competes unfairly for jobs needed by their talented successors.

A Martian would find it incredible that we appear here with hat in hand for the passage of this legislation. Where else in these United States does one have to beg to get paid for the use of his work when the users of his work acknowledge the value of the product and grow rich on it? This is madness—it is unfounded in logic, in ethics or economics.

The performers I represent here make an obvious, ever-increasing contribution to the programing of radio and television stations. Basic American fairness requires that they be recognized and compensated.

Please disabuse yourselves of the notion so widely cultivated by our opposition that the sales of records directly reflect the number of times the record is played on the air. Even accepting the arrogant premise that radio stations spend 75 percent of their air time out of eleemosynary concern for the record industry—and in disregard of their own profits—that notion is simply not true. Sales often suffer from overexposure and overplay on radio. Simply put, why buy a record when you can hear it free?

Put out of your minds too, the canard propagated by the broadcaster that artists grow rich because of record sales.

Present here today with me are men and women unknown to you. No Sinatra, Diana Ross, Elvis Presley, Johnny Cash or Fifth Dimension. No Perry Como, Kate Smith, or Johnny Mann here; but on the records made by those stars and played on radio stations throughout the land, these people present contributed their invaluable services—their performances were and are being heard.

To put the phony argument to rest, I am pleased to advise you that the two performing unions have reached a firm agreement under which all performers will share equally in the royalties.

For example, if on a Frank Sinatra there are 10 musicians and 5 background singers, the royalty provided would be split equally among the 16 people on the phonograph record.

Let me tell you something about the performers here with us today. And they, too, are prepared to answer any questions you may desire to ask of them about the record business.

Mr. David Grupp, a professional drummer who for 62 years has played for symphonies, on network television, recordings, theaters, clubs—even at weddings. Many of the thousands of records he has worked on are still being extensively broadcast, and he has never

received a penny from the radio stations who profit from his talent. Mr. Grupp.

Mr. William Ackerman, born and raised in Nashville, has been making popular, country, and rock and roll recordings since 1960. At least 100 of the more than 5,000 recordings that Bill has made have gone over the million mark in sales. He hears his product played on radio stations all over the country, but he is not paid for or consulted about the broadcast of his talents.

Ralph Mendelsohn's instrument is viola. He has been with the New York Philharmonic for 23 years. When he joined the orchestra in 1953, its musicians were able to augment their earnings by radio broadcast fees. Today the Philharmonic's music is still used on radio to an even greater extent, but it is recorded, and Mr. Mendelsohn and the other members of the orchestra get nothing.

Louis Nunley of Nashville is probably the most recorded bass singer in the world. He's been a background singer since 1953, with thousands of records to his credit. Over 1,500 of these have made the broadcast charts, and more than 200 made the top 10 in radio play. Lou never received a penny for the broadcast of any of his records.

Lois Winter has been a successful classical and popular vocalist for 25 years. She has performed as a background singer for every kind of recording, literally from A to Z—beginning with the Ames Brothers to Jazz Fiddler Florian Zabach. Remember Mitch Miller's record, "The Yellow Rose of Texas"? How could you forget it. Lois, who has a master's degree in music theory, got $16 for the initial session fee, and nothing for the thousands upon thousands of subsequent radio plays of that record.

Miss Lillian Clark, like Miss Winter, is a working singer living in New York. She began her career with the Clark Sisters, and has sung with such groups as the Skylarks and the Sentimentalists with Tommy Dorsey.

She and Miss Winter together have participated in thousands of New York recording sessions over a span of 25 years. Like the others, Miss Clark has received and receives nothing for the radio plays of her work.

Shirlee Matthews is one of the busiest singers in Los Angeles, devoting a major portion of her time and talent to phonograph recordings. You hear her voice every morning on the radio as you drive to work, and every night as you drive home. Shirlee is in demand because her talent is unique, and her sound, as they say, is popular. But she is not helped by the use of her recordings by broadcasters. Indeed, overexposure may shorten the length of her career. Shirlee and two other ladies whose names you would not recognize were The Supremes, a group whose records were played thousands of times on radio with absolutely no payment to Shirlee or her colleagues.

Ron Hicklin, also from Los Angeles, has a list of titles longer than my arm. He's sung with Frank Sinatra, the Monkees, Andy Williams, and innumerable other stars you would recognize. Mr. Hicklin has received for the work he has done on those records and he will again receive the munificent sum of $18 when he started in the business to about $30 today, just union scale, and not 1 penny for radio plays.

These and thousands of their anonymous colleagues are the people

who bring the incomparable joys of music to America and to a large extent bring America to the world.

These people and their colleagues are the indispensable source, the indispensable source of the huge profits of the broadcasting industry.

It is our fervent plea that they be granted the recognition and compensation so long and so sadly overdue.

We are deeply appreciative, Mr. Chairman, for this opportunity.

Mr. KASTENMEIER. Thank you, Mr. Wolff.

Next is Mr. Stanley Gortikov who has appeared before this committee on other occasions. We greet you, Mr. Gortikov.

Mr. GORTIKOV. Thank you. My name is Stanley Gortikov and I am president of the Recording Industry Association. Our member companies create and market about 85 percent of the records and tapes sold in the United States.

I am here to support legislation granting rights and royalties to recording musicians, vocalists, and companies for the public performance of sound recordings. To supplement my oral testimony, I offer for inclusion in the record a more comprehensive statement.

Mr. KASTENMEIER. Without objection, that statement you referred to will be accepted and made part of the record.

[The prepared statements of Stanley Gortikov and of the Recording Industry Association follow:]

STATEMENT OF STANLEY M. GORTIKOV, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

INTRODUCTION

My name is Stanley M. Gortikov. I am president of the Recording Industry Association of America. Our member companies create and market about 85% of the records and tapes sold in the United States.

I am here to support legislation (S. 1111, H.R. 5345 and companion bills) granting rights and royalties to recording musicians, vocalists, and companies for the public performance of sound recordings. To supplement my oral testimony, I offer for inclusion in the record a comprehensive statement on a performance right for sound recordings.

EXTENDING A BASIC COPYRIGHT PRINCIPLE

It is a traditional copyright concept that one who uses another's creative work for profit must pay the creator of that work. The exclusive right of the copyright owner to authorize the public performance of his creative work is known as a "performance right." The compensation he receives for the public performance of his product is a "performance royalty."

A sound recording is a copyrightable, creative work. It is the product of the cooperative, creative efforts of vocalists, musicians, composers, and recording companies. Under the 1909 copyright law, the publisher/composer is paid a performance royalty when a broadcaster plays a record containing the composer's tune. The rest of the creative team, however, the performing artists and recording company, are paid *nothing* when the product of their creativity—the sound recording itself—is used for gain by another.

This makes no sense. Congress has already recognized on two separate occasions—in 1971 and again in 1974—that the sound recording bears all the elements of a copyrightable product. Yet, as the general revision bill now stands, the sound recording is the *only* copyrighted creative work for which a royalty will not be paid when it is performed by others.

Significantly, the revision bill grants *new* performance royalties to broadcasters from cable TV. Even more to the point, Section 116 grants *new* performance royalties to composers when *sound recordings* are played by jukeboxes. The performing artists and recording companies deserve to be included to . . . for the very same reasons.

BROADCASTERS' OWN ARGUMENTS SUPPORT RECORDING INDUSTRY'S POSITION

Ironically, our strongest *allies* in advocating this principle to Congress are the very same broadcasters who *oppose* this legislation.

Only last month, broadcasting spokesmen appeared before the House Copyright Subcommittee to support this same principle. The broadcasters seek payments from cable television whenever cable uses broadcasters' copyrighted program material for profit.

One of the broadcaster representatives testified: "It is unreasonable and unfair to let (the cable) industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime. That offends my sense of the way things ought to work in America."

We of the recording industry maintain that it is likewise unreasonable and unfair to let the *broadcasting industry* ride on our backs, as it were, to take our product, resell it, and not pay us a dime.

Broadcasters expect payment when their copyrighted programs are used for another's profit. So do we. Broadcasters aggressively seek copyright payments when they take risks and make investments. We do too. And the recording industry, like the broadcasting industry, wants equitable payment when its product is used by broadcasters to build audiences, sell commercial time, and build station equity values.

Again, the broadcasters themselves said it best, this time the spokesman for the National Association of Broadcasters: "Copyright law . . . must insure that those who profit without paying compensation, of any sort, do so in violation of the intent of the Constitution's framers."

When it is in their economic interest, the broadcasters support the principle of rewarding creators. When it is not in their economic interest, the broadcasters oppose it. This is neither logical nor fair. We respectfully suggest that Congress not allow the broadcasters to have it both ways.

There are those who may tell you these two situations are different. I suggest to you that they are virtually identical. Only the names of the players are different.

MOST AIRPLAY DOES NOT HELP SALES OF RECORDINGS

The broadcasters will tell you that they should not have to pay a performance royalty for the use of sound recordings, because airplay helps sell records. They will remind you that record companies actively seek airplay of new recordings. As you may know, a few record promoters may not have used good sense in seeking airplay, and may have been in violation of the law. Their alleged misdeeds, however, are certainly not representative of the business behavior of the thousands of persons in the recording industry.

Certainly, record companies *do* seek airplay on *new* recordings, so the broadcaster argument may sound good. It is a hollow and deceptive argument, however, if you examine all the facts.

In fact, radio stations do not use recordings for their programming to do record companies a favor. They use recordings because that is the best way, in their judgment, to build audiences—which attracts advertisers, which leads to profits, and also increases station equity value.

In fact, sound recordings are the mainstay of most radio programming. More than 75% of radio program time is devoted to recordings.

In fact, most recordings get zero sales benefit from airplay. The vast majority of recordings never get airplay at all. A Top-40 radio station usually adds only five or six new songs a week to its play list—out of more than 900 new recorded tunes released weekly.

In fact, more than 75% of all recordings released fail to recover their costs. Only about 6% make any real profits, and they must carry the load for all the rest. Classical recordings fare even worse. Over 95% of classics lose money, but they are played on the radio with no compensation to the vocalists, the musicians, or the recording companies.

In fact, some 56% of all recordings played on the radio are those whose meaningful sales' life is over. Over the last few years, we've seen a resurgence of older recordings. Airplay of older recordings drastically cuts exposure opportunities for new records. It does little or nothing to generate more record sales, though it helps radio's own goals.

In fact, although recording companies want their new product airplayed, they certainly are not out for a "free ride." Recording companies today are

among the major purchasers of commercial advertising over radio and TV. For example, our most recent data indicate that in 1972, recording companies paid out to radio stations, over $32,000,000 for commercial advertising. And in 1974, the record industry spent nearly $65,000,000 for television advertising. By way of contrast, the estimated annual yield to recording companies from performance royalties would be about $5,000,000, even less in early stages.

In fact, broadcasters pay for virtually every other form of programming they employ, except for sound recordings. That includes news services, dramatic shows, disc jockeys, personalities, sports shows, game shows, syndicated features, weather, commentators, financial and business services. Yet, they pay nothing for the recordings which furnish 75% of their programming.

We suggest to you that airplay of sound recordings does more to attract advertising profits to radio stations than it does to sell sound recordings. Only *some* recordings played over the air benefit performers and companies. But *all* recordings played over the air benefit the broadcasters—old recordings, new recordings, popular ones, and classics. They *all* build audiences for the broadcasters and enable them to sell time to advertisers.

But the performance royalty principle in the copyright law is not conditioned on who benefits from what. Publishers and composers benefit from the airplay of sound recordings, too. Yet, no one questions their entitlement to performance royalties. Similarly, cable TV operators claim that they should not have to pay royalties because they benefit the broadcasters by expanding their audience, and hence their advertising revenues. But the broadcasters reject that claim, just as we reject theirs. If the principle is valid that one should be compensated for the commercial exploitation of his creative product, then the musicians, vocalists and the recording company are likewise entitled to a performance royalty.

You may also be interested in the fact that nearly every other Western nation grants a performance right to sound recordings. Unfortunately, American record companies are often denied performance royalties from abroad because foreign record companies do not enjoy reciprocal rights in the United States.

THE CREATIVE ROLE OF RECORDING COMPANIES

Perhaps some of you have thought of a record company as "just a manufacturer," producing tapes and discs and selling them, with the creative work coming only from the performers and composer. This is a mistaken notion.

The recording company plays an essential, highly creative role in the development of a sound recording. I spent 11 years as a record company executive, and served as president of Capitol Records for 3 years. I would like to tell you about the many creative processes performed by the men and women who work for recording companies as they originate sound recordings:

1. They develop the creative concept of the record or album and its basic musical ideas.
2. They choose the tunes and subtly merge the right composition with the right performer.
3. They select the arranger and musicians best suited to the unique musical demands of the recording.
4. They produce the recorded performance and coordinate the delicate interplay between vocalist, arranger, musicians, and recording engineer.
5. They execute the extremely complex processes of multiple-track recording and editing and they ingeniously tap the infinite variables of electronically-influenced sound.

A sound recording, then, is an original creative work, which Congress has concluded is a copyrightable product. The creative contribution of recording companies was recognized by the Senate Judiciary Committee when it stated, in its July 1974 Report on Copyright Law Revision, "The Committee . . . finds that record manufacturers may be regarded as 'authors' since their artistic contribution to the making of a record constitutes original intellectual creation."

The Register of Copyrights wrote, in 1974, "In my opinion, the contributions of both performers and record producers are clearly the 'writings of an author' in the constitutional sense, and are as fully worthy of protection as any of the many different kinds of 'derivative works' accorded protection under the Federal copyright statute."

Moreover, the U.S. Supreme Court ruled in 1973 that the copyright clause of the Constitution can extend to "recordings of artistic performance."

MULTIPLE INCOME SOURCES ARE VALID FOR ALL

Broadcasters say that performers and record companies should be satisfied with their income from the sales of recordings alone. That should be enough, they say. Broadcasters protest that performance royalties would be an unwarranted additional income source.

But no one is questioning the right of music publishers and composers to separate income from performance royalties as well as mechanical royalties and music sales and foreign royalties and motion picture royalties. And we all acknowledge that book authors and publishers gain separate income from hardbacks, paperbacks, television, motion pictures, foreign rights, and magazine and newspaper reproduction.

In support of the effort to make cable pay copyright fees for use of televised programming, Jack Valenti, president of the Motion Picture Producers Association, acknowledged in Congressional testimony that "a basic concept of copyright includes separate payments for multiple uses." Thus, the broadcasters seek supplemental income from program syndication and from cable TV's new uses of their programs—different payments for different uses. So much for the broadcaster arguments against multiple income.

A MODEST FEE SCHEDULE FOR BROADCASTERS

Broadcasters may also suggest that they cannot afford to pay a performance royalty. Or that the fee schedule would hurt smaller stations. In fact, the payment of a performance royalty by broadcasters for use of sound recordings would be just a tiny drop in a very large bucket.

The radio and television industries are growing and prosperous. Their revenues, profits, and equity values over the years all have been increasing.

The fee schedule established in this legislation is quite modest, especially when you remember that 75% of radio programming is based on sound recordings:

1. Radio stations with net advertising revenues below $25,000 a year would pay nothing.
2. Radio stations with revenues between $25,000 and $100,000 would pay $250 a year, or about 75 cents a day.
3. For stations between $100,000 to $200,000, the annual fee would be only $750, or about $2 a day.
4. Stations with revenues of more than $200,000 would pay a maximum of 1% of their annual net income from advertisers, or some lesser percentage based on their actual usage of recordings.

Under this fee schedule, 62% of all radio stations would pay either nothing, or token fees, ranging from 75 cents to $2 a day. And 38% of stations, with advertising revenues of more than $200,000 a year, would pay the full performance fee of up to 1%. This 1% is a small sum indeed compared with the 3.7% that the radio stations voluntarily agree to pay publishers and composers through ASCAP, BMI and SESAC.

For television stations, the fees are more modest, ranging from no payment at all for those with revenues of less than $1,000,000 a year, to $1,500 annually for those with revenues of more than $4,000,000.

On the basis of these fee schedules, the Senate Judiciary Committee in 1974 concluded that, "The committee's analysis of the economics . . . of the broadcasting industry, indicates an ability to pay the royalty fees specified."

Remember, too, that if a station considers its fee to be unfair, that station has full discretion as to what it broadcasts. It need not play any records if it does not want to make the payment. It has the unilateral right to turn to any other programming form of its choice.

CREATION OF MUSIC CULTURAL FUND

While you may think of recording companies most often in terms of the popular music they produce, our companies serve a number of other cultural interests. They record classical music, folk music, ethnic music, country music, and experimental music, plays, poetry and educational material. They help find and develop young artists, musicians and composers, and bring much-needed income to some symphony orchestras.

The recording companies take seriously the responsibility to provide all types of music on sound recordings, and to foster and encourage the creation, performance and enjoyment of music.

For this reason, some member companies of our Association have suggested creation of a special Recording Industry Music Cultural Fund, to foster serious music projects throughout the United States. This Fund might be financed by the contribution of 5% of the performance royalties received by participating recording companies, if this legislation is enacted. While no procedures have been established, the Fund conceivably might be administered through the National Endowment for the Arts, perhaps in cooperation with States Arts Councils.

PERFORMANCE RIGHT SHOULD BE INCORPORATED IN REVISION BILL

Finally, we urge you to make this legislation part of the general Copyright Revision Bill. That is where it was previously. That is where it belongs. As the Senate Judiciary Committee said last year, there is "no justification for not resolving this issue on the merits at the present time. All relevant and necessary information is available."

SUMMARY

In conclusion:

1. Vocalists, musicians and recording companies are entitled to a performance royalty, because a sound recording is a copyrightable, creative work, as Congress and the courts have recognized.
2. Those who use recordings for their profit should pay for the privilege, as they do for all other copyrighted works.
3. The sound recording is the only creative, copyrighted work performed that does not receive a performance royalty under the Copyright Revision Bill.
4. The broadcasting industry can afford to pay the modest fees established.
5. There is no valid or logical reason for *not* granting a performance royalty to the creators of sound recordings. Even the broadcasters support that basic principle, when it is in their economic interest.
6. We believe the time has come to correct the inequity which deprives performing artists and recording companies of income they deserve when their works are used for the profit of others.

Statement of Recording Industry Association of America, Inc., in Support of a Performance Right for Sound Recordings, as Reflected in S. 1111 and H.R. 5345

This statement has been prepared by the Recording Industry Association of America. Much of the technical information contained in the statement, identified by footnotes, has been drawn from an objective analysis prepared by the Cambridge Research Institute, an independent management consulting and business research firm.

SUMMARY

It is a traditional copyright concept that one who uses another's creative work for profit must pay the creator of that work. The exclusive right of a copyright owner to authorize the public performance of his creative work is known as a "performance right." As the general copyright revision bill now stands, sound recordings are the *only* copyrighted works which can be performed that have not been granted a performance right.

The performance rights bills now pending in the Congress—S. 1111 and H.R. 5345—would remedy this inequity by establishing rights and royalties for the public performance of copyrighted sound recordings. Those bills require broadcasters and others who use sound recordings for their profit to compensate the vocalists, musicians and record companies for the commercial exploitation of their creative efforts. Half of the royalties would go to the performing artists, and the other half would go to the recording companies.

I. EQUITABLE AND ECONOMIC FACTORS OVERWHELMINGLY SUPPORT A PERFORMANCE RIGHT FOR SOUND RECORDINGS

1. *Sound Recordings Account for Three-Fourths of Radio Programming.* The basic staple of radio programming is recorded music. The Senate Judiciary Committee has noted that 75 percent of commercially available time is used to play sound recordings. Thus, recorded music accounts for roughly three-quarters of stations' advertising revenues—or about $900 million annually. Yet broadcasters—who must pay for all their other types of programming—pay no

copyright royalties to performers or record companies for the prime programming material they use to secure their audiences, revenues and equity values.

2. *Recordings Have Replaced "Live" Performances.* Broadcasters used to pay for "live" performers, but these artists have actually been replaced by their own recordings. It is inequitable for these recorded performances to be broadcast for profit without any payment being made to the performers.

3. *Composers and Publishers Receive Performance Royalties.* Under the existing Copyright Law, broadcasters pay the composer and publisher of the song that is played over the air in a sound recording. But the performers and record company whose artistry and skill brought that composition to life in a recorded performance, and whose creative contribution is at least equal to, if not greater than, that of the composer, are paid nothing.

4. *No "Free Ride" for Record Companies.* The record companies do not get a "free ride" from broadcasters. Radio stations do not use recordings for their programming to do record companies a favor. They use recordings because that is the best way, in their judgment, to build audiences, which attracts advertisers, which leads to profits, and also increases station equity value. Further, about 56% of the records played are "oldies" that enjoy few current sales, if any. Record companies and performers derive little benefit from such air-play, but these recorded performances draw massive listening audiences for broadcasters and, in turn, advertising revenues for the stations. Finally, record companies *purchase* over $32 million of advertising time from radio stations annually—about three times the total projected performance royalties under the proposed legislation.

5. *Broadcasting Industry Very Profitable.* The broadcasting industry is exceedingly healthy. Between 1967 and 1973 (the last year for which data are available), the pre-tax profits of radio stations rose 39 percent, and advertising revenues rose 61 percent.

6. *Royalty Fees Are Very Modest.* The proposed performance royalty fee is not burdensome. About one-third of the nation's radio stations would pay *68¢ per day.* Another third would pay *$2.05* per day. The remaining third of the stations—large stations with more than $200,000 in annual advertising revenues—would make a modest payment of one percent of net advertising revenues. Thus, even a station earning revenues of *$1 million* annually would pay only $27.40 daily, or $1.14 per hour to compensate the vocalists, musicians and record companies for the exploitation of their creative efforts. Clearly, the performance royalties are fair and reasonable, particularly in light of the immense advertising revenues that recorded music produces.[1]

The rate schedule is as follows:

Revenues	*Annual fee*
More than $200,000	1 percent of net advertising revenues.
$100,000 to $200,000	$750.
$25,000 to $100,000	$250.
$25,000 and under	None.

Further, all-news stations or others which do not rely heavily on recorded music would pay only a pro rata share of the performance royalty percentage.

7. *Performance Royalty Consistent with Cable TV Royalties.* The principle underlying the performance rights bills is identical to that supported by the broadcasters in the general revision bill. Broadcasters assert that cable systems should be required to pay the broadcaster and copyright owners when cable TV picks up the broadcasters' over-the-air signal. In testimony before the House Copyright Subcommittee, they said "it is unreasonable and unfair to let (the cable TV) industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime." But broadcasters, too, are "taking somebody else's product and . . . selling it for profit." In directly parallel fashion, therefore, they should be required to pay the creators of sound recordings when they use that programming material for their profit.

8. *Performance Royalty Recognized Abroad.* The principle of the bill is not at all radical. Almost all other Western nations require the payment of performance royalties to performers and recording companies. Some of these foreign payments are currently denied to U.S. artists and companies because our country offers no reciprocal right. The primary reason that the principle

[1] A chart detailing, by state, the number of radio stations in each of the royalty rate categories is set forth after page 9, *infra.*

has not been established here is that the last revision of the copyright laws took place in 1909, long before sound recordings became a significant source of programming materials for commercial exploitation by broadcasters and others.

II. THERE CAN BE NO "CONSTITUTIONAL DOUBT" THAT THE PRODUCTION OF A SOUND RECORDING IS A CREATIVE ACTIVITY DESERVING OF COPYRIGHT PROTECTION

1. *Copyright Protection Covers Wide Variety of Creative or Intellectual Efforts.* Copyright protection has never been limited to the "Writings" of "Authors" in the literal words of the Constitution. To the contrary, Congress has granted a copyright to a wide variety of works embodying creative or intellectual effort, including such "Writings" as musical compositions, maps, works of art, drawings or plastic works of a scientific or technical character, photographs, motion pictures, printed and pictorial illustrations, merchandise labels, and so on.

2. *Constitutionality of Copyright for Sound Recordings Upheld.* Both Congress and the Courts have recognized that sound recordings may be granted copyright protection under the Constitution. In the Anti-piracy Act of 1971, where Congress conferred limited copyright protection upon sound recordings, the Senate Judiciary Committee concluded that "sound recordings are clearly within the scope of 'writings of an author' capable of protection under the Constitution." [2] The Committee rejected the constitutional objection once again only last year.[3]

The Courts have expressly upheld the constitutionality of legislation according copyright protection to sound recordings. In *Capitol Records, Inc.* v. *Mercury Records Corp.*,[4] the Court said that

"there can be no doubt that, under the Constitution, Congress could give to one who performs a . . . musical composition the exclusive right to make and vend phonograph records of that rendition."

A three-judge federal Court has likewise concluded that the activities of sound recording firms "satisfy the requirements of authorship found in the copyright clause. . ." [5] The United States Supreme Court, too, has indicated that the copyright clause can extend to "recordings of artistic performances." [6]

Finally, the Copyright Office has advised that it is within Congress' constitutional power to grant copyright protection to sound recordings.[7]

3. *Creativity in Production of Sound Recording.* Performers and record companies engage in creative activity when they use their artistic skills, talents, instruments and engineering to produce and record a unique arrangement and performance of a musical composition. The Senate Judiciary Committee has found creative copyrightable elements in the "performer whose performance is captured and . . . the record producer responsible for setting up the recording session and electronically processing the sound and compiling and editing them to make the final sound recording." [8]

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[2] S. Rep. No. 92–72, 92d Cong., 1st Sess., pp. 4–5.
[3] S. Rep. No. 93–983, 93d Cong., 2d Sess., pp. 139–40.
[4] 221 F. 2d 656, 657 (2d Cir. 1955).
[5] *Shaab* v. *Kliendienst*, 345 F. Supp. 589, 590 (D.D.C. 1972).
[6] *Goldstein* v. *California*, 412 U.S. 546, 562 (1973).
[7] 120 Cong. Rec. S14565 (daily ed. Aug. 8, 1974).
[8] S. Rep. No. 92–72, 92d Cong., 1st Sess., pp. 4–5.

S. 1111 AND H.R. 5345—NUMBER OF RADIO STATIONS, BY STATE, IN EACH ROYALTY RATE CATEGORY

[Categories are annual revenues of reporting stations, in thousands of dollars]

State	Stations located in SMSA				Stations located in nonmetropolitan area				SMSA/Nonmetropolitan total				Total stations reporting
	$0 to $25	$25 to $100	$100 to $200	$200 plus	$0 to $25	$25 to $100	$100 to $200	$200 plus	$0 to $25	$25 to $100	$100 to $200	$200 plus	
Alabama	0	14	27	24	0	45	28	3	0	59	55	27	14
Alaska	0	2	0	5	2	7	2	2	2	9	2	7	20
Arizona	1	5	8	21	1	14	9	3	2	19	17	24	62
Arkansas	1	15	14	8	0	28	24	5	1	43	38	13	95
California	13	54	71	118	5	23	23	11	18	77	94	129	318
Colorado	2	7	11	20	1	10	18	6	3	17	29	26	75
Connecticut	0	4	12	25	0	0	3	2	0	4	15	27	46
Delaware	0	0	1	5	0	2	1	3	0	2	2	8	12
Florida	5	37	39	80	5	29	16	11	10	66	55	91	222
Georgia	2	10	23	31	3	47	52	14	5	57	75	45	182
Hawaii	0	3	5	9	0	3	2	3	0	6	7	12	25
Idaho	1	2	0	3	4	17	16	3	5	19	16	6	46
Illinois	6	16	20	56	1	20	36	18	7	36	56	74	173
Indiana	4	19	14	34	2	20	20	14	6	39	34	48	127
Iowa	1	7	6	18	1	8	28	19	2	15	34	37	88
Kansas	0	4	1	13	1	14	18	15	1	18	19	28	66
Kentucky	2	7	8	15	5	47	33	11	7	54	41	26	128
Louisiana	1	20	11	28	2	24	15	5	3	44	26	33	106
Maine	0	3	2	5	0	13	9	7	0	16	11	12	39
Maryland	1	5	8	25	2	5	14	6	3	10	22	31	66
Massachusetts	3	3	16	43	1	2	9	6	4	5	25	49	83
Michigan	1	16	25	59	3	15	23	16	4	31	48	75	158
Minnesota	1	8	13	20	1	10	27	18	2	18	40	38	98
Mississippi	1	2	4	8	1	51	36	6	2	53	40	14	109
Missouri	0	13	8	31	8	38	29	8	8	51	37	39	135
Montana	1	0	4	5	2	13	10	9	3	13	14	14	44
Nebraska	0	3	1	5	0	14	15	10	1	17	16	15	48
New Hampshire	0	0	1	5	1	10	9	5	1	10	10	10	31
New Jersey	2	3	11	23	0	3	4	2	2	6	15	25	48
New Mexico	1	5	2	4	1	18	21	5	2	23	23	9	57

S. 1111 AND H.R. 5345—NUMBER OF RADIO STATIONS, BY STATE, IN EACH ROYALTY RATE CATEGORY

[Categories are annual revenues of reporting stations, in thousands of dollars]

State	Stations located in SMSA				Stations located in nonmetropolitan area				SMSA/Nonmetropolitan total				Total stations reporting
	$0 to $25	$25 to $100	$100 to $200	$200 plus	$0 to $25	$25 to $100	$100 to $200	$200 plus	$0 to $25	$25 to $100	$100 to $200	$200 plus	
New York	5	26	28	84	1	20	25	17	6	46	53	101	206
Nevada	2	5	5	12	1	3	2	0	3	8	7	12	30
North Carolina	1	15	27	38	0	53	69	14	1	68	96	52	217
North Dakota	0	0	0	3	2	8	9	7	2	8	9	10	29
Ohio	4	12	29	73	0	11	16	19	4	23	45	92	164
Oklahoma	2	15	7	15	4	22	18	3	6	37	25	18	86
Oregon	3	11	6	16	0	22	27	7	3	33	33	23	92
Pennsylvania	6	19	39	75	0	22	31	17	6	41	70	92	209
Rhode Island	0	1	5	9	0	0	2	0	0	1	7	9	17
South Carolina	2	9	16	15	2	20	37	7	4	29	53	22	108
South Dakota	0	1	2	3	3	7	14	4	3	8	16	7	34
Tennessee	1	18	15	39	1	60	29	9	2	78	44	48	172
Texas	7	39	50	99	10	74	46	6	17	113	96	105	331
Utah	2	9	2	10	0	6	5	0	2	15	7	10	34
Vermont	0	0	0	0	0	2	10	7	0	2	10	7	19
Virginia	2	11	23	30	1	26	34	12	3	37	57	42	139
Washington	2	16	18	19	1	28	9	8	3	44	27	27	101
West Virginia	0	4	8	11	1	19	13	10	1	23	21	21	66
Wisconsin	0	11	13	24	1	21	28	22	1	32	41	46	120
Wyoming	0	0	0	0	2	12	14	2	2	12	14	2	30
Total	89	509	659	1, 321	83	986	988	417	172	1, 495	1, 647	1, 738	5, 052

Source: FCC filings by individual stations for 1972.

Note: Under the royalty rate proposed in S. 1111 and H.R. 5345, stations with annual revenues under $25,000 are exempt; stations with revenues between $25,000 and $100,000 pay a flat fee of $250; stations with revenues between $100,000 and $200,000 pay a flat fee of $750; stations with more than $200,000 in revenues pay a 1 percent royalty on net advertising receipts.

I. RECORDING COMPANIES AND PERFORMING ARTISTS MERIT A PERFORMANCE ROYALTY

The performer's interpretation of a tune is crucial to its success, and is no less a contribution to the recorded product than is the composer's original lyrics and score.

Many vocalists and musicians are not sustained by royalties from record sales, and their opportunities for live performances have been sharply curtailed by the use of pre-recorded music by broadcasters. A performance royalty would alleviate this situation.

The recording company's creative contribution to a song is very significant; it constitutes original creative activities to which copyrght protection can be granted under the Constitution.

The recording company must underwrite severe financial risks in the production of a record; over three-fourths of all records fail to break even financially and the proportion of failures is rising. Yet broadcasting companies profit from the airplay of all records, whether successful or not.

Congress and the Register of Copyrights have noted the merits of a performance royalty for sound recordings. In addition, the constitutionality of vesting a copyright in a sound recording has been upheld by the courts.

The performer's interpretation of a tune is crucial to its success

Performers' interpretations of tunes and their participation in the actual creation of audible music contributes creatively to the recorded product no less than the actual tunes composers contribute to recordings. A record is a composite of the artistic creativity not only of the composer, but also of the performer and the recording company.[9]

As William Cannon stated,

"There are many factors in the total popularity of a record, and the song itself is many times of minor importance. The most important factors vary in predominance from record to record and any one of them may be of prime importance on a particular recording. These are the artist (singer, instrumentalist, or group) . . .; the song or tune, but never in its original state; the arranger who embellishes the composition or orchestrates the work and decides how the total musical sound will be arrived at . . .; the engineers who control acoustics and make electronic alterations in the sounds . . .; and the very important area of exposure and promotion to the public." [10]

The performer can make an important creative contribution to every type of recording. The highly talented jazz musician's original interpretation of a musical composition is often far removed from the original tune set down in lines of notes of the copyrighted work. In classical music, too, there can be considerable variation in the interpretation of a piece. As the Director of the Boston Symphony Orchestra stated,

"Improvisation is one of the earmarks of the performer in music. . . . You're engaged in a creative act whenever you interpret a score. If the performer and the artists were not important, then one recording of Beethoven's Ninth would be sufficient for everyone for all time. Why bother with a second interpretation if it can be no different than the first? Or a third?" [11]

The role of the artist can be even greater with popular music. Here it is often the artist's performance as much as—or more than—the composer's tune that makes the recording attractive to both record buyers and radio audiences. The artist as much as the tune have made hits of Barbra Streisand's "People", Frank Sinatra's "My Way", and the like. There must be a hundred versions of "White Christmas", but it is Bing Crosby's special rendition which is continuously popular at Christmas each year. Listeners are eager to hear albums by Andy Williams or the Boston Pops Orchestra, but may be less concerned with any particular song or its composer. In some cases a song which enjoyed

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[9] The statement of John Desmond Glover before the *Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. House of Representatives,* 1965, in Part II, Exhibit 4, gives an illustration of the significant creative contribution of the artist and the record manufacturer to the simple melody copyrghted by the composer and publisher in order to transform this simple melody into a commercial product.

[10] Statement of William Cannon, owner of the Cannon Coin Machine Co., *Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. House of Representatives on H.R. 4347,* 1965, pp. 565–566.

[11] Statement of Erich Leinsdorf, then Music Director of the Boston Symphony Orchestra, in *Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597,* April 1967, p. 821.

little success in one recording becomes a hit when a new recording is made with a different artist or arrangement.[12] Yet, ironically, the performer who makes a composer's tune into a hit, and earns that composer much compensation in the form of mechanical royalties and performance royalties, shares in none of the performance royalties himself. *The composer is deservedly paid performance fees for his contribution to a recording used by broadcasters, but the performer, too, is entitled to compensation.*

Royalties from record sales do not sustain all performers

Performance fees would provide needed income to those performers who fail to earn substantial royalties from record sales—classical artists, jazz artists, and many popular artists as well. Such performers "never burst into stardom because their appeal is only felt by a narrow segment of the public. They may never have a hit record, although they may have many, many records which are performed time and again for commercial profit."[13] One performer reports, "he is 'very big in supermarkets and elevators', and everywhere he goes he hears his music being played. Yet he does not receive one dime for these commercial performances."[14]

Performance royalties would also bring income to singers no longer collecting substantial royalties from the sale of their hit recordings. Many famous artists, such as Ernie Ford, Mitch Miller, and Pat Boone, sell fewer records today, but airplay of their old records remains heavy. Some radio stations still offer the recorded music of Nat King Cole, and

". . . everyone benefits but Nat Cole's widow and children. The sponsor attracts an audience with one of the top vocalists of our generation, and the radio station sells time to the sponsor, the writers and publishers of the songs are paid performance fees for the broadcast of these songs, but Nat Cole's widow and children receive absolutely nothing, nor does the record company that spent 20 years building him as a top recording artist, and owns the masters which are used for these delayed performances."[15]

Such performers (and their heirs) should be compensated for the continued commercial exploitation of their endeavors by others.

Performance fees would, of course, also increase the income of those few artists who are presently collecting sizeable artists' royalties from the sale of their recordings. However, *the recording careers of even successful performers tend to be distressingly short*, and artists, like baseball players, must often maximize income within short periods. "It is not unusual for a performer to find himself in a high tax bracket for a year or so, to be followed by a lifetime of oblivion. The rise of a star is sometimes meteoric, but his popularity often burns out just as quickly."[16] Furthermore, *the percentage of performers who are successful for even a brief period is far smaller than is apparent to the general public*, which has been fed tales of the fortunes earned by the recording world's fleeting stars. Many artists dream of riches, but few actually attain them. One recording company reported in 1967, that of the performers that they list, only 14 percent had earned enough royalties on sales to defray the expenses normally charged to artists' royalty accounts. Only 188 or so of its 1,300 performers had a profit in their royalty account.[17] Performance fees from broadcasting would supplement the income of at least some of these artists who are receiving meager royalties from sales.

The Minority Report of the Senate Judiciary Committee (in July 1974) expressed concern that, if broadcasters had to pay performance royalties to performers and record makers, "it may well become cheaper for broadcasters to revive studio orchestras and be content to pay the musicians' union scale."[18]

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[12] See "Publishers, Labels Find Success With 'Underexposed' Copyrights", *Record World*, January 25, 1975, p. 4.

[13] Statement of Stan Kenton in *Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597*, April 1967, pp. 542 and 543.

[14] Ibid.

[15] Statement of Alan Livingston in *Ibid.*, p. 500.

[16] Statement of Stan Kenton in *Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597*, April 1967, p. 821.

[17] Statement of Michael DiSalle in *Ibid.*, p. 832.

[18] U.S. Senate, Committee on the Judiciary, *Report on Copyright Law Revision* (Report No. 93–983), July 3, 1974, p. 226.

Performers certainly would have no objection to such a turn of events, but unfortunately, broadcasters are unlikely to abandon the use of recordings simply because of a new performance royalty which increased their expenses by less than 1%.[19]

In conclusion, performers are entitled to compensation for the commercial use of recordings created by their artistic endeavors, just as composers certainly merit the performance fees paid to them for the privilege of using their work in broadcasting for profit.

The recording company's creative contribution to the artistic rendition is very substantial

A recording company makes a two-fold contribution to a recording: the technical manner in which it records a piece of music, and the financial risk it undertakes in producing the recording.

The quality of a recording and its appeal to listeners is very much affected by the way the recording was made: the type of recording equipment and studio facilities used, the electronic effects and recording techniques employed, and the character of the song arrangement and background music selected. As recording techniques have become more sophisticated and as experimentation with electronic effects has grown, the creative contribution of recording companies to their products has increased dramatically, beyond simply the fidelity of a recording.

An article in the *Wall Street Journal* describes "How Record Producers Use Electronic Gear to Create Big Sellers." [20]

"Each instrument has its own microphone leading to its own track on the big console's recording tape.... (The producers) will cut, slice and dub tracks from the best of the musicians' performances to eliminate flubs by one or two of them, and they'll pick tapes from (the singer's) performances for her best lead vocal. For her harmony parts, they can manipulate the tapes to make her sound like a duo, a trio, a quartet—or even, if necessary, a 16-voice choir. They also will add violin flourishes, called 'sweeteners'. Finally they will blend and distill all this into two stereo record tracks."

The creative contribution of recording companies was recognized by the Senate Committee on the Judiciary when it stated, in its July 1974 Report on Copyright Law Revision, "*The Committee . . . finds that record manufacturers may be regarded as 'authors' since their artistic contribution to the making of a record constitutes original intellectual creation.*" [21]

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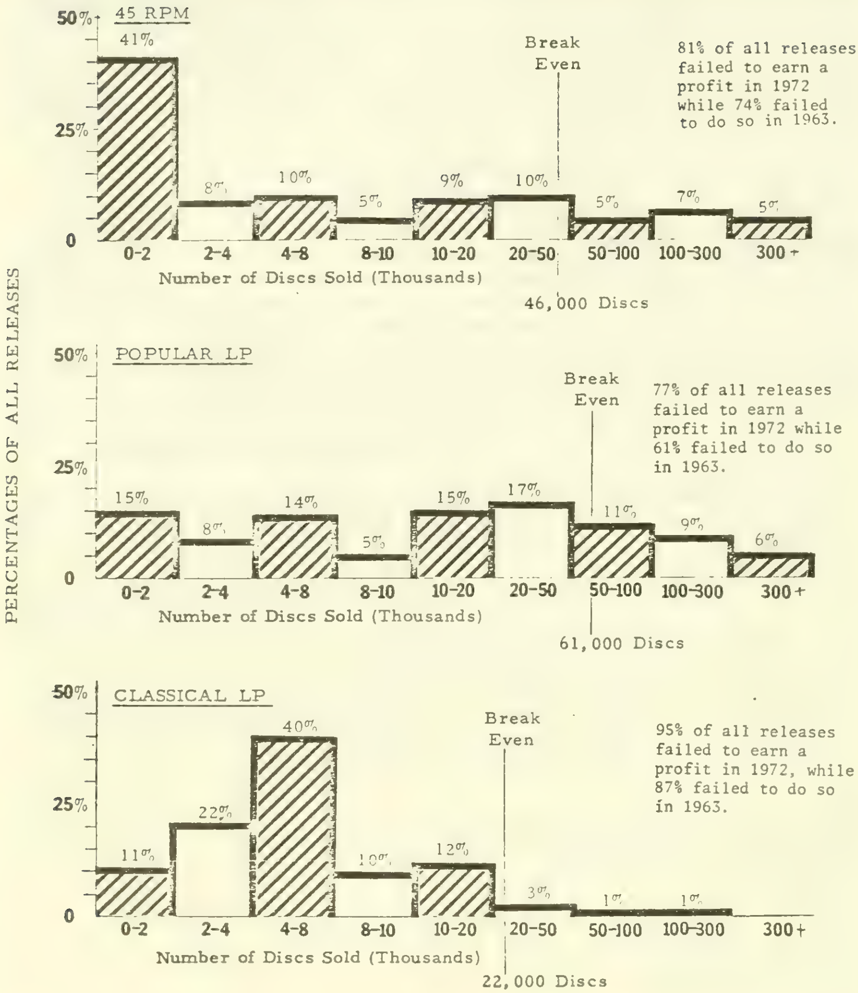
[19] See pages 41–42, *infra*.
[20] *Wall Street Journal*, February 12, 1974, p. 1.
[21] U.S. Senate, Committee on the Judiciary, *Report on Copyright Law Revision* (Report No. 93–983), July 3, 1974, p. 140.


PERCENTAGES OF ALL RELEASES
45 RPM
50%
25%
0
41%
8%
10%
5%
9%
10%
5%
7%
5%
Break Even
81% of all releases failed to earn a profit in 1972 while 74% failed to do so in 1963.
0-2
2-4
4-8
8-10
10-20
20-50
50-100
100-300
300+
Number of Discs Sold (Thousands)
46,000 Discs
POPULAR LP
50%
25%
0
15%
8%
14%
5%
15%
17%
11%
9%
6%
Break Even
77% of all releases failed to earn a profit in 1972 while 61% failed to do so in 1963.
0-2
2-4
4-8
8-10
10-20
20-50
50-100
100-300
300+
Number of Discs Sold (Thousands)
61,000 Discs
CLASSICAL LP
50%
25%
0
11%
22%
40%
10%
12%
3%
1%
1%
Break Even
95% of all releases failed to earn a profit in 1972, while 87% failed to do so in 1963.
0-2
2-4
4-8
8-10
10-20
20-50
50-100
100-300
300+
Number of Discs Sold (Thousands)
22,000 Discs

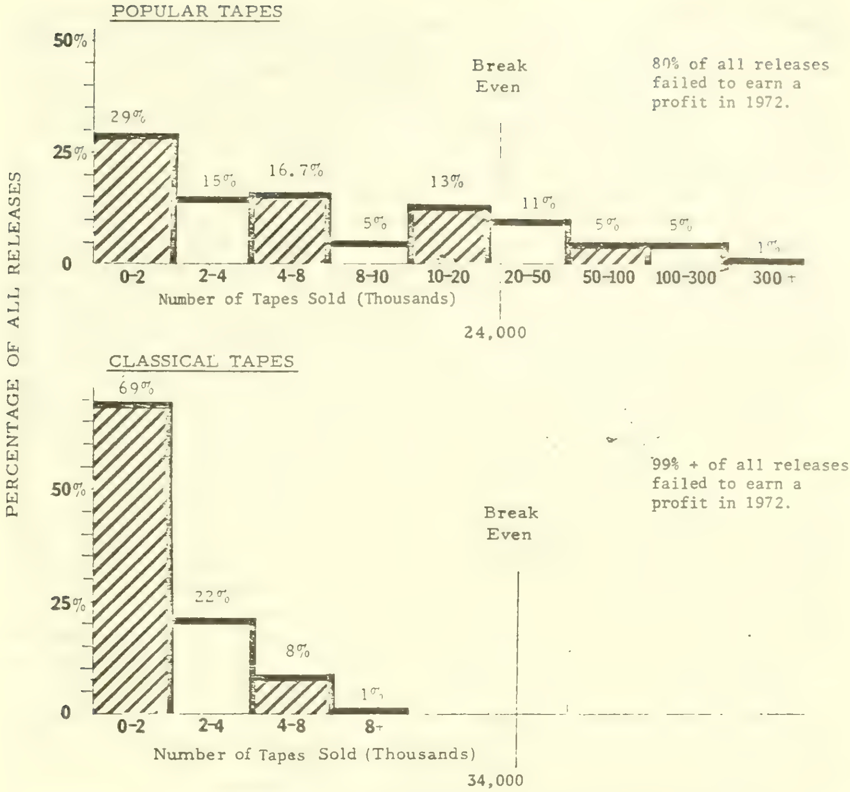


EXHIBIT 1.—*Record makers unit sales per release and breakeven points (1972)*

Source: These figures are based on an analysis done by Cambridge Research Institute of a sample of the releases of eight record companies which had 51 percent of the industry's sales in 1972.

The manner in which a piece of music is recorded contributes not only to the music quality but also to the audience lure and, therefore, the commercial value of any recording used by broadcasters. Recording companies also make a contribution by creating a product that can be used by radio and TV stations without hiring performers. Radio's use of recordings builds audiences, sells commercial time, and creates radio profits. Television's use of recordings adds an important dimension to TV programs. For these contributions, recording companies are entitled to compensation by broadcasters.

The recording company must underwrite serious financial risks

In addition, *recording companies undertake a substantial financial risk in producing recordings, for the large majority of recordings do not even recover their costs, let alone make a profit,* and the proportion of unprofitable recordings is rising. Over 80% of the 45 RPM records and over 75% of the "popular" LP records released do not have sufficient sales to break even. (See Exhibit 1 on the next page.) An even higher proportion, 95%, of classical records are produced and marketed at a loss. It is only reasonable to expect that all who benefit from this risk-taking by the recording companies should compensate them for any commercial value derived from the use of their recordings.

With performance fees, the record producing companies might be encouraged to make more classical and experimental recordings, for which the sales outlook is uncertain. As one recording company president has pointed out—

"If performance fees were to go to the record company and the performer, there would be an end to the record industry's frantic concentration on teenage rock-and-roll in search for fast and large sales and quick return. Presently, the only road to profit for the performer and the record company is the sale of records: therefore, most music must be designed for the specialized record-buying market. . . . The generation that listens to the 'good music' stations are, unfortunately, not record buyers. . . . Let the record companies be compensated for the use of their records on the air, and they will be financially able to record for the benefit of the large listening audience which wants to hear good recorded music, but which does not necessarily buy records." [22]

The commercial risks involved in producing a recording used by broadcasters fall on record companies much more than on publishing companies. If a recording is not a commercial success, the record maker loses. The publishing company and the composer are still paid mechanical fees by the record company whether or not the recording is profitable, and they also get whatever performance royalties accrue from the recording with no additional outlays on their part. To produce a recording costs considerably more than to print sheet music, and recording companies generally expend much more money (and ingenuity) promoting the music than does the publisher. As the President of the American Guild of Authors and Composers has pointed out, the role of the publisher is declining in importance: "Years ago a publisher bought a song, plugged it and got it performed, in eventual hopes of getting a record. Now a song is nothing without a record at the start." [23]

At least in part because of this diminishing relative contribution of the publisher to a tune's success, composers more and more often act as their own publishers for promotional purposes and hire a commercial publishing company solely to print and distribute the sheet music. Although we do not question that the publishing corporations are still entitled to the performance fees they currently receive from broadcasters, it is surely true that record makers and performing artists also merit performance fees for their creative contribution and their commercial risk in producing the recordings used so extensively by broadcasters.

The legal merits for a performance right

In addition to these observations, *it is very important to recognize that the authorities agree unanimously that Congress has the power under the Constitution to require that artists and recording companies be paid performance royalties for the commercial use of their recordings.* For example:

The Register of Copyrights wrote in July 1974,

"Performing artists contribute original, creative authorship to sound recordings in the same way that the translator of a book creates an independently copyrightable work of authorship. Record producers similarly create an independently copyrightable work of authorship in the same way that a motion picture producer creates a cinematographic version of a play or novel. In my opinion, the contributions of both performers and record producers are clearly the 'writings of an author' in the constitutional sense, and are as fully worthy of protection as any of the many different kinds of 'derivative works' accorded protection under the Federal copyright statute." [24]

The Supreme Court stated in 1973 that the copyright clause of the Constitution can extend to "recordings of artistic performance." [25]

The Senate Judiciary Committee concluded in 1974 that recordings are entitled to full copyright protection:

"Records are 'writings' and performers can be regarded as 'authors' since their contributions amount to original intellectual creations. The committee, likewise, finds that record manufacturers may be regarded as 'authors' since their contribution to the making of a record constitutes original intellectual creations. The committee endorses the conclusion of the Copyright Office that sound recordings 'are just as entitled to protection as motion pictures and photographs'." [26]

In conclusion, because of the creative activity involved in recorded performances that is recognized unanimously by the relevant authorities, there is no

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[22] Testimony of Alan Livingston in *Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate,* Part 2, (March 1967), p. 504.

[23] *New York Times,* August 8, 1966.

[24] 120 Cong. Rec. S14565 (daily ed. Aug. 8, 1974).

[25] *Goldstein v. California,* 412 U.S. 546, 562.

[26] U.S. Senate, Committee on Judiciary, *Report on Copyright Law Revision,* (Report No. 93–983), July 3, 1974, p. 140.

legal reason why sound recordings should remain the only copyrighted product without performance rights. The contributions of both the performers and the recording companies merit such rights in full.

NOTE. Congress granted copyright protection for public performances of dramas in 1856, of musical compositions in 1897, and of motion pictures in 1912.

II. IT IS COMPLETELY EQUITABLE FOR PERFORMING ARTISTS AND RECORDING COMPANIES TO OBTAIN A PERFORMANCE RIGHT

Performers and recording companies are entitled to a performance royalty from broadcasting companies by the very same logic that entitles broadcasters to royalties for the programs retransmitted by CATV operators—*i.e.*, unfair exploitation of another's property for profit.

Broadcasters currently pay less than 3% of their expense dollar for the programming which generates 75% of their revenues. All of this goes to music publishers and composers. None goes to musicians, vocalists and recording companies. This is totally inequitable.

The fact that radio airplay helps the sales of some new records is fundamentally irrelevant to the fairness of granting a performance right.

Most other Western nations now recognize a performance right, and the United States has much to gain by following suit.

The parallel with CATV

There is no stronger argument in support of a performance right for sound recordings than the very same argument which broadcasters are using to urge that cable television companies should pay royalties on the programs they propagate through secondary transmission. The broadcasting companies have sought compensation from CATV for the commercial exploitation of their product without their consent. Performers and recording companies, in requesting performance fees from radio and television broadcasting companies, are seeking precisely the same right. If CATV should pay for the use of *programming* created by others, so broadcasting should pay for the use of *recordings* created by others. If CATV is required to compensate broadcasting companies, then it is only equitable that broadcasters should be required to compensate record makers in a similar fashion.

Jack Valenti, on behalf of the Motion Picture Association of America, stated on August 1, 1973 at the hearings before the Senate Copyright Subcommittee:

". . . I agree with Senator Burdick that the crux of this is that the free market place ought to be the determinant as to what a man pays for the product he chooses from a supplier. And, indeed, that is the way cable (television) operates on everything that goes into its system. It buys at a bargain price or price that is set by its suppliers for everything that they use, except one, their copyrighted materials, which is the grist of their business." [27]

If the word "cable" were changed to "broadcasting companies", this quotation could serve just as well to describe the condition that exists with respect to broadcaster's use of copyrighted recordings. On the basis of such reasoning, the Senate Judiciary Committee in 1974 stated its belief that "just as cable systems will now be required to pay for the use of copyrighted program material, so should broadcasters be required to make copyright payments under the performance royalty." [28]

Broadcasters should pay for all of their program materials

The performance royalties currently paid to composers and publishing companies reflect the principle of fair compensation for the use of another's creation. But their creations are only tunes. Without arrangement, performance and all the rest, the tune remains silent, only printed notes on a page. It is creative arrangement, performance, and recording that makes a tune into music, and it is another's *music* that the broadcasting companies are exploiting without fair compensation.

Fully 75% of radio airtime is devoted to the playing of recordings.[29] The payments to composers/publishers for the use of the tunes on these recordings equal only 2.8% of radio station expenses, and no payments are made for the use on the air of the recordings themselves. (See Exhibit 2 on the next page.) *Thus*

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[27] *Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597,* March 1967, p. 251.

[28] U.S. Senate, Committee on the Judiciary, *Report on Copyright Law Revision,* (Report No. 93–983), July 3, 1974, p. 141.

[29] See study reported by RIAA in the hearings cited above, pp. 487–491.

broadcasting corporations pay virtually nothing for the bulk of the program material which attracts advertisers.

Such was not always the case. As Red Foley pointed out in hearings before the Senate Subcommittee eight years ago,

"At one time the recording artist could look to 'live' radio as an important source of income and employment. But in the 1950's local radio stations discovered greater profits were available by playing recorded music. Therefore, the 'live' shows virtually died and local stations switched from network programming of 'live' shows to the playing of recorded music . . . Today, instead of 'live' performance opportunities, the artist is in the ironic position of having been displaced by his own recordings, which the radio stations use for profits, without the performer receiving any of the benefit from the profits that his creative performance produces." [30]

As a result, radio stations can no doubt charge advertising rates that are relatively cheaper than those of other media with which they compete, and which must pay for all their programming material.

We maintain that this situation is inequitable.

EXHIBIT 2.—*Breakdown of expenses of all radio stations* [1]

	Amounts (thousands)				Percent of total expenses for all stations			
	1970	1971	1972	1973	1970	1971	1972	1973
Program costs:								
Payroll for program employees	$208,224	$222,078	$240,841	$260,275	20.9	20.1	19.7	19.3
All other program expenses not itemized below	34,522	40,543	42,468	48,837	3.5	3.7	3.5	3.6
Music license fees paid to composers and publishers	29,937	32,274	35,616	37,310	3.0	3.0	2.9	2.8
Other performance programing rights	11,903	12,950	13,245	14,410	1.2	1.2	1.1	1.1
Cost of outside news services	19,933	20,908	23,355	24,930	2.0	1.9	1.9	1.8
Payments to talent not on payroll	8,203	8,443	9,080	9,355	.8	.8	.7	.7
Records and transcriptions	5,123	5,678	6,063	6,763	.5	.5	.5	.5
Total program costs	317,845	342,876	370,669	401,881	31.8	31.0	30.2	29.8
Nonprogram costs:								
Total technical expenses	102,171	107,984	115,638	120,045	10.3	9.8	9.4	8.9
Selling, general, and administrative (including depreciation)	578,017	655,890	739,046	826,994	57.9	59.2	60.4	61.3
Total nonprogram costs	680,188	763,874	854,684	947,039	68.2	69.0	69.8	70.2
Total broadcast expenses	998,034	1,106,750	1,225,354	1,348,920	100.0	100.0	100.0	100.0

[1] These figures are for all AM, AM–FM, and FM stations with revenues of more than $25,000. They do not include networks whose figures are broken down somewhat differently. The figures are compiled from those reported in the FCC's annual reports on broadcasting financial data. Last digits may not add to totals, due to rounding.

Record sales are fundamentally irrelevant to the fairness of a performance royalty

As underscored by the risk analysis in the previous section, the fact that recording companies profit from the sales of recordings should not be used, as some would maintain, as a pretext for preventing them from earning additional legitimate income from the use of these recordings by others to sell broadcasting time, aspirin or automobiles. Composers receive royalties both from the sale of records and from the playing of records over the air. Radio and TV broadcasters record, syndicate and sell for re-use some programs which have already created ad sales for them. Motion pictures are secondarily paid for TV showings. There is no just reason why record producing companies should not also earn income from multiple sources in exactly the same way.

In addition, it has often been argued that radio airplay boosts the sales of sound recordings. It is certainly true that airplay can help the sales of some new releases. However, it is important to keep two points in mind: first, the stations which play exclusively the so-called "Top 40" songs usually start playing them after the songs have become significant sellers in their own right. Not

[30] Statement of Red Foley, *Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate*, April 1967, p. 814.

only that, a typical Top-40 radio station rarely adds more than five or six new songs each week to its airplay, but about 135 single records and 75 new albums representing almost 900 tunes are released each week.[31] Clearly, many of these receive no airplay at all.

Second, most airplay does not produce significant record sales because it is devoted to "oldies" (i.e., records that have been out on the market for a number of years and are long past their period of significant sales), and the vast majority of record sales occur on albums which have been on the market for less than 90 days.

This conclusion is based on the following facts. In 1967, 70% of Capitol Records' total sales were accounted for by records which had been on the market for less than 90 days.[32] A 1975 analysis on one company's record catalogue listing all recordings released in the last two years showed that 75% of all sales of records on the list were sales of recordings released in the previous 90 days. A further survey of five record companies indicated that, on the average, 70% of their 1974 sales were of recordings released that year. Clearly, a newly-released record is a rapidly wasting asset.

At the same time, as can be seen in Exhibit 3 on the next page, an analysis of the advertising revenues earned by radio stations in six major markets showed that, of the revenues earned by the playing of music, 55.8% were earned by the playing of "oldies". Even though these are minor sales items for recording companies, old recordings as well as new ones lure radio audiences and enable stations to make sales to advertisers. And yet, no compensation is ever paid for the artistry, know-how, enterprise and investment that went into creating that vast repertory which has unequalled commercial value for radio and television companies.

In addition, frequent airplay of some popular songs can actually decrease sales due to overexposure. In the industry such a song is called a "turntable hit". "This means the tune was a hit in terms of the number of times it was played on the air, but the performer does not receive royalties for broadcast plays, and the substantial sales he counted upon never materialized."[33] Another way airplay can hurt a recording's sales is by making it possible for listeners to make a copy on tape without buying the recording.[34]

Finally, if radio airplay did contribute significantly to record sales, there would be no need for the recording companies to spend the vast sums they do on record advertising. *Billboard* magazine reported in May 1975 that record advertising on television soared to $65 million in 1974, including cooperative ads by retailers.

EXHIBIT 3.—*Analysis of music programing in stations in 6 major markets*

Market and number of music stations in market (news and foreign language stations omitted)	Estimated daily music revenue assuming 5 advertising minutes per hour [1]	Revenue due to "oldies" programing, as reported by each station in early 1975, aggregated by market
Baltimore, Md. (22 stations)	$48,683	$28,018
Houston, Tex. (23 stations)	65,138	30,791
Los Angeles, Calif. (48 stations)	176,407	102,197
New York, N.Y. (25 stations)	156,983	91,682
Salt Lake City, Utah (20 stations)	31,293	15,955
Washington, D.C. (29 stations)	95,029	51,227
Total	573,533	319,870

[1] Minute rate multiplied by 5 multiplied by airplay hours per day multiplied by 0.75. (The assumption of 5 advertising minutes per hour is not crucial to the result. Multiplying by 0.75 takes into account the fact that 3/4 of programing is recorded music.)

Note: Composite share of all revenues due to oldies=$319,870/$573,533=55.8 percent.

Source: Survey conducted by Cambridge Research Institute.

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[31] A tune may be released on both a single and an album, so the statistics on record releases give a slightly overstated picture of the number of tunes released.

[32] Testimony of Alan Livingston in *Hearngs Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597*, April 1967, p. 497.

[33] See testimony of Stan Kenton in *Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597*, March 1967, p. 540.

[34] Testimony of Michael DiSalle in *ibid.*, p. 832.

The data on radio advertising expenditures developed from a survey by the Cambridge Research Institute indicates that in 1972 the comparable total was on the order of \$32 million.[35] One reason for this is again that few tunes receive any airplay at all.

All of these observations notwithstanding, whether recording companies or performers benefit in any way from the broadcasting of their products is a subordinate argument. As Senator Tunney pointed out in 1974,

"The real issue is whether or not a person who uses creative talents should receive compensation from someone else who takes them and profits from them. More than 75% of the airtime during which advertising is sold is spent playing music. I believe if the artist's creative efforts are used in this way he is entitled to some compensation."[36]

A performance royalty should be paid in the United States as it is in most other western nations

An "International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations" was adopted in 1961. This convention, known as the Rome convention, stated in Article 12:

"If a phonogram published for commercial purposes, or a reproduction of such phonogram is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonogram, or to both."

So far the convention has been ratified by fifteen countries, including the United Kingdom, West Germany, Austria, Denmark, and Sweden.

Although the details of the laws vary, *Japan and most countries in Europe also have domestic laws specifying that performance fees should be paid to recording companies and/or performers for the use of recordings in broadcasts*, and arrangements are made on either a legal or a voluntary basis for the two groups to share the performance fees collected. (See Exhibit 4 on the next page.) In Japan, the four Scandinavian countries, Austria, and Czechoslovakia, the law grants performing rights to both record producers and performers. In the United Kingdom, Ireland, Spain, and Italy, the law grants performing rights to record producers alone, but the record producers have sharing arrangements on a voluntary basis with performers. In West Germany, on the other hand, a law gives performing rights to performers, with a share to be paid producers. In France, Belgium, and the Netherlands, the law does not specifically recognize performance rights in records, but broadcasting organizations nevertheless pay fees to the record producers.

EXHIBIT 4.—*Countries in which the law grants performance rights to performers and/or record makers*

Australia	East Germany	Philippines
Austria	Iceland	Poland
Barbados	India	Rumania
Brazil	Ireland	Sierra Leone
Chile	Israel	Singapore
Costa Rica	Italy	Spain
Cyprus	Jamaica	Sri Lanka
Czechoslovakia	Japan	Sweden
Denmark	Mexico	Trinidad and Tobago
Dominican Republic	New Zealand	United Kingdom
Ecuador	Norway	West Germany
Fiji	Pakistan	
Finland	Paraguay	

Note: In some countries, such as France, Belgium, and the Netherlands, the law does not specifically recognize performance rights in records, but broadcasting organizations nevertheless pay fees to record producers.

Source: International Producers of Phonograms and Videograms. "General Survey on the Legal Protection of Sound Recordings As At December 31, 1974."

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[35] The survey conducted for RIAA by the Cambridge Research Institute is based on reporting by seven companies representing 42.3 percent of industry sales, with respect to purchases of non-co-op radio time; as to co-op radio time, six companies representing 40.7 percent of industry sales reported. The total recording industry figure of \$32 million was grossed up to 100 percent of the industry from the foregoing bases. See also, *Billboard* 5/10/75 and 5/15/75, p. 1. *Billboard* has estimated that radio advertising including co-op in 1974 was \$3.5 million, a figure that obviously is inaccurate.

[36] U.S. Senate, Committee on the Judiciary, *Report on Copyright Law Revision* (Report No. 92–983), July 3, 1974, p. 222.

Canada, moving in a contrary direction to the rest of the world, recently abandoned performance fees for performers and record companies. However, this action was taken primarily because most payments were remitted to United States recording artists and United States record makers, with no reciprocity for Canadian artists in the United States. This explanation was documented by the statement of The Honorable Ron Basford, the Minister responsible for the introduction and passage of the Government Bill, at the commencement of the hearings before the Standing Senate Committee on Banking, Trade and Commerce in the Canadian Parliament in December, 1971:

"May I be permitted, Mr. Chairman, to draw your attention and that of honourable senators to what I view as certain important considerations. I shall be very brief and will then subject myself to whatever questioning that honourable senators have. As has been made clear in evidence before you, 95 percent of the record manufacturers, through this performing right society known as Sound Recording Licenses (SRL) Limited, are subsidiaries of, or associated with, foreign firms, in very large measure American firms. The American principals of the SRL group do not have the right in the United States that their Canadian subsidiaries are now demanding and trying to exercise in Canada through the tariff that was accorded to them in the recent decision of the Copyright Appeal Board.

"What is not available to the record manufacturers in the United States is apparently regarded as necessary in Canada. What is not available to the foreign parents is claimed in Canada. Surely this is an anomalous position for us in Canada to find ourselves in, and surely it is an inequitable one from the point of view of Canadian users of records."

In addition, *United States record producers are often denied performance royalties from abroad because foreign record companies do not enjoy reciprocal rights in this country.*[37]

"For example, in Denmark, payment is made only for the performance of recordings originating in Denmark itself or in a country which grants reciprocal rights to recordings of Danish origin. As a result, no payment is made for the use of U.S. recordings there."[38]

If this country followed the precedent of others in paying performance fees to record producers and performers, more performance fees would flow into this country than would flow out. In 1974, for example, ASCAP received from abroad $12.3 million in performance fees, but it paid out to foreign performing rights societies only $5.9 million. Were the performance right enacted, the performance fees paid to U.S. artists and recording companies would contribute positively to the balance of international payments.

III. THE IMPACT OF A PERFORMANCE ROYALTY UPON BROADCASTERS, ADVERTISERS, AND CONSUMERS WOULD BE SLIGHT

Economic analysis indicates an ability on the part of broadcasting companies to pay the proposed performance royalty. A growing amount of airtime which radio has been able to sell to advertisers has combined with an expanding audience for radio programs to produce sharply rising radio revenues and profits. Even if the proposed performance fee were not covered by either higher ad sales or higher ad prices, the fee would increase total radio expenses by less than 1%, and amount to 8%–10% of radio's pretax profits (for radio stations with revenues of $25,000 or more).

If instead, radio stations elected to pass forward the expense of a performance royalty to their advertising sponsors, the increase would be minimal compared with advertising rate increases posted in recent years. In addition, radio's advertising advantages are such that a 1% (maximum) increase in advertising rates is very unlikely to scare away advertisers.

The proposed performance royalty for television stations would amount to a mere 0.07% of 1973 pre-tax television profits. Television's return on sales would not be affected.

If advertisers also passed forward the costs of a performance-royalty for recording companies and performing artists, the impact on wholesalers and consumers would be scarcely perceptible.

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[37] [38] Statement by Sidney Diamond in *Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate, Part 2,* March 1967, p. 508.

Broadcasters have the ability to pay a performance royalty

Radio industry trends indicate the industry can cope easily with the added expense of a performance royalty paid to performers and recording companies. Radio is a growing and prosperous industry, as reflected by the following trends based on 1973 data, the last year for which FCC statistics are available.

Radio is a larger industry than the recording industry; in 1973, net radio revenues were $1.5 billion while net sales by the recording companies were about $1 billion.[39] The profitability of the two industries has been about the same in recent years even though recording industry profits are notably volatile: radio pre-tax profits were 7.4% of net revenues in 1973, and recording company pre-tax profits were 7.8% of net sales.

Radio advertising revenues have grown even more rapidly than total advertising revenues for all media. While total advertising revenues grew 49% between 1967 and 1973, radio advertising revenues grew over 61% during those years.[40] (See Exhibit 5 on the next page.) The Commerce Department projects that radio revenues will grow $2.7 billion by 1980, an increase of 60% over the 1973 figure.[41]

Total radio pre-tax profits rose 39% between 1967 and 1973, the last year for which data is available, to a level of $112.4 million.[42] (See Exhibit 5.)

The number of radio stations grew 20% between 1967 and 1973.[43] So many new radio stations would not be opening up if the financial future of the radio industry were not considered to be attractive.

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[39] Retail sales of recordings *at list prices* are reported in *Billboard International Buyers Guide*, September 14, 1974, as about $2 billion. Since most recordings are sold at a discount, actual retail sales are about 80% of the *Billboard* figure. The prices at which recording companies sell records and tapes to distributors average about 50% of list prices.

[40] According to *Advertising Age's* Research Department, total advertising revenues rose from $16.9 billion in 1967 to $25.1 billion in 1973, while radio advertising revenues rose from $1.05 billion in 1967 to $1.7 billion in 1973.

[41] "Government Report Plots Good Growth Through 1980 for Radio, TV, Cable," *Broadcasting*, November 11, 1974, p. 48.

[42] FCC annual reports on *AM–FM Broadcast Financial Data* indicate that radio's pre-tax profits rose from $80.9 million in 1967 to $112.4 million in 1973.

[43] Accounting to the FCC's annual reports on *AM–FM Broadcasting Financial Data*, the number of radio stations rose from 4,481 in 1967 to 5,358 in 1973.

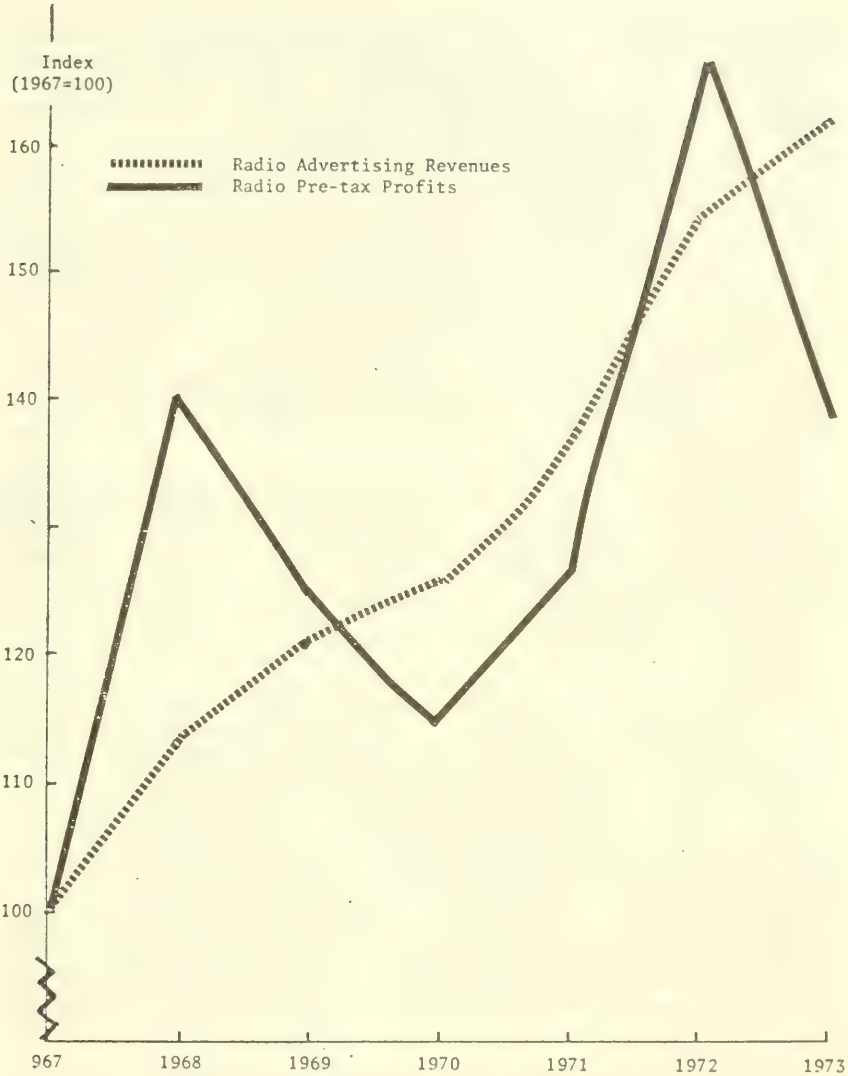

EXHIBIT 5.—*Radio revenues and pretax profits 1967–1973*

Sources: FCC annual reports on AM–FM Broadcast Financial Data.
Research department of Advertising Age.

The prices at which existing radio stations are sold have shot up. For example. "Back in 1970 * * * the price in Cleveland for a 'raw FM license' (meaning any given facility regardless of its particular *pro* and *con* attributes) was $70,000. Now, reports a Midwest broker, it would go for $1.2 million. Four years ago a raw facility in Miami would sell for about $500,000. Today you couldn't pick it up for less than $1 million." [44] Prices for AM stations are rising, too. The average

[44] "One Sure Indicator of FM Growth: High Price Tags on Stations," *Broadcasting*, October 7, 1974, p. 50.

transaction price per trade of *all* radio stations rose from $54,674 in 1954 to $188,829 in 1967 to $464,820 in 1971.[45] *Thus, between 1967 and 1971 the average transaction price rose 146% while the Consumer Price Index rose 21% during those years, and radio station revenues advanced 38%.* Apparently investors consider that radio has good future prospects, for just as they might accord a high price/earnings ratio to a desirable common stock, they are valuing radio stations far in advance of their actual revenue and earnings growth.

Radio has been able to sell increasing amounts of time to advertisers despite the rise in its advertising prices. This is reflected in the fact that radio advertising revenues have been rising more rapidly than the prices radio charges advertisers. For example, while radio spot ad prices rose 19% between 1967 and 1973, radio spot ad revenues rose over 21% during that period.[46] (Radio spot advertising is national advertising which permits the advertiser to select the radio markets to which his message will be beamed. Spot advertising is distinguished from network advertising, which is also national advertising but which restricts the advertiser to network-affiliated stations.)

Radio has been able to increase its audience considerably. Between 1968 and 1973, the audience for radio spot ads grew 32%.[47] Because of the substantial growth in radio audiences, the cost of radio spot ads/1,000 listeners grew only 7% between 1967 and 1973, even though an advertiser's cost/minute of radio spot ads went up 19%.[48]

The audience for radio encompasses almost the entire population of the United States. Of all adults, 96% are reached by radio at some time during the week. Each adult on the average listened to radio 3 hours and 22 minutes per day in 1974—a dramatic increase from the 2 hours and 31 minutes the average adult devoted to radio in 1969. The average time adults listened to radio in 1974 is only slightly less than the comparable television figure: 3 hours and 48 minutes, and television had only a three minute increase between 1969 and 1974. Of all U.S. homes, 98.6% had at least one radio in working order, and 95% of all cars are equipped with radios. Cars with radios have the radio on 62.5% of driving time.[49]

It is interesting to compare this prosperity of the radio industry with the proposed fees spelled out in S. 1111-H.R. 5345, the text of which is similar to that of Section 114 of the Copyright Bill passed by the Senate Judiciary Committee in July, 1974. The provisions require broadcasting corporations to pay performance fees to recording artists and recording companies. These bills favor smaller radio stations by exempting them from the proposed performance royalty. Stations with annual revenues of less than $25,000 (2.6% of stations in 1973) would be completely exempt from the performance royalty. Stations with revenues between $25,000 and $100,000 (26.5% of all stations in 1973) would pay only a token performance royalty of $250 a year. Stations with revenues between $100,000 and $200,000 (33% of all stations in 1973) would pay a performance royalty of just $750 a year. Only the remaining 38% of stations, which have revenues above $200,000 a year, would pay the full performance fee equal to 1% of their net receipts from advertisers, and this fee would be reduced for those stations using less than the usual amount of recordings. *Thus, 62% of all radio stations would be exempt or pay only a token performance right to performers and recording companies, and only the large stations would pay the full performance right of 1%.*

On the basis of this fee schedule, the Senate Judiciary Committee one year ago concluded that, "The committee's analysis of the economics . . . of the broadcasting industry, indicates an ability to pay the royalty fees specified in Section 114." [50]

Indeed, as can be seen in Exhibit 6 on the next page, an estimate can be made (based on 1973 radio revenues) that the total performance fees paid by radio to performers and recording companies under S. 1111-H.R. 5345 would have been

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[45] Using statistics in the *1973 Broadcasting Yearbook*, the average transaction price for radio stations only (not combined radio-TV stations) was derived from the total dollar valne of FCC-approved transactions, divided by the number of radio stations changing hands, including both majority and minority transactions.

[46] Radio spot ad revenues rose from $313.5 million in 1967 to $380 million in 1973, according to *Advertising Age's* Research Department. Radio spot ad prices rose 19% according to "1974–75 Cost Trends," *Media Decisions*, August 1974, p. 45.

[47] "Broadcasting in 1975: Shipshape in a Shaky Economy," *Broadcasting*, January 13, 1975, p. 35.

[48] "1974–75 Cost Trends," *Media Decisions*, August 1974, p. 45.

[49] Radio Advertising Bureau, *Radio Facts: Pocket Piece*, 1975 and 1970 editions.

[50] U.S. Senate, Committee on the Judiciary, *Report on Copyright Law Revision* (Report No. 93–983), July 3, 1974, p. 140.

between $10 and $12 million. Referring once again to Exhibit 2, (the exhibit in Section II on program costs) two things should be noted: first of all, a performance fee expense of, say, $11 million would have added a scant 2.7% to total program costs in 1973. Secondly, the proportion of all expense dollars going into program costs has been declining, while that of administrative salaries, general overhead, and selling expenses has been rising. If the proposed performance fees were required, thereby adding about $11 million to program costs, the proportion of all broadcast expenses going toward programming would still be only 30.3%, less than it was in 1970. *Hence, there would be no significant change in broadcasters' cost structures.* All in all, the proposed performance fees represent less than a 1% increase in radio station expenses.

EXHIBIT 6.—*Performance royalties that would be paid by radio stations under S. 1111*

Revenue category	Number of AM, AM/FM stations in this revenue category in 1973 [1]	AM, AM FM estimated performance royalty (based on 1973 revenues) (thousands) [2]	Estimated number of FM stations in this revenue category in 1973 [3]	Estimated number of stations of all types in this revenue category in 1973	All stations' estimated performance royalty (based on 1973 revenues) (thousands) [2]
Less than $25,000	36	0	98	134	0
$25,000 to $100,000	996	$202–$239	367	1,363	$276–$327
$100,000 to $200,000	1,420	863–1,022	255	1,675	1,018–1,206
Over $200,000	1,761	8,209–9,729	204	1,965	8,769–10,393
Total	4,213		924	5,137	
Total for stations with revenues of $25,000 or more	4,177	9,274–10,990	826	5,003	10,063–11,926

[1] These figures are based on 1973 FCC statistics for those radio stations operating a full year.

[2] Formula for the performance royalty in both S. 1111 and in sec. 114 of copyright bill passed by Senate Judiciary Committee in July 1974:

Stations with revenues from $25,000 to $100,000 would pay a flat royalty of $250; stations with revenues from $100,000 to $200,000 would pay a flat royalty of $750—but the fees would average only about 81–96 percent of this because of fee reductions granted stations using less than the usual amount of recorded music. (See exhibit II–2 on the percentage of stations which are music stations.)

Stations with revenues above $200,000 would pay a royalty equal to 1 percent of their "net sponsor receipts." If allowance is made for stations devoting less than average air play to recorded music, the performance royalty would average perhaps 0.81 to 0.96 percent of "net sponsor receipts." AM, AM/FM stations in this revenue category had 77 percent of all AM, AM/FM stations expenses in 1973 and thus, we estimate, earned 77 percent of the $1,316,117,000 collected in "net sponsor receipts" by all AM, AM/FM stations in 1973. No data are available on total net revenues earned by FM stations with revenues above $200,000. We estimate that 24.7 percent of the FM stations with revenues above $25,000 fall in this category, while 42 percent of AM, AM/FM stations are known to do so. We have also estimated that AM, AM/FM stations with revenues over $200,000 earn 77 percent of total AM, AM/FM revenues. We, therefore, estimate that FM stations with revenues over $200,000 earned 45 percent of all FM revenues (24.7÷42×77) or $69,127,000 in 1973.

[3] 1973 FCC data indicate the distribution among various revenue categories of independent FM stations but do not do so for FM stations affiliated with an AM station but reporting separately to the FCC (and therefore not included in the statistics for AM, AM FM stations). We have assumed that the 2 types of FM stations have the same distribution among the revenue categories. The number of FM stations with revenues under $25,000 was reported to be 98 in 1973. Therefore, this revenue category the number of stations is correct and is not an estimate.

Source: Analysis made by Cambridge Research Institute based on the FCC's "AM–FM Broadcasting Financial Data," 1973 (the latest available statistics).

The same performance fee would represent about 8-10% of the radio industry's pre-tax profits (for all those stations with revenues above $25,000).[51] *On balance, the proposed performance fee for performers and record makers is not likely to seriously impair the profitability of the growing and generally prosperous radio industry.*

Ability of broadcasting companies to pass forward the costs of a performance royalty

Although the preceding analysis demonstrates clearly that broadcasting companies can easily absorb the costs of a performance royalty, *the stations could, if they so elected, pass this new expense forward just as other programming costs and profit increases have been successfully passed on in higher advertising rates.* Indeed, it is equitable for the stations to pass along the costs of a performance royalty, because advertisers benefit from the audiences that sound recordings attract.

[51] According to the FCC's *AM–FM Broadcast Financial Data—1973*, radio stations with revenues over $25,000 had total profits before taxes of $118,261,000 in 1973.

Furthermore, radio has raised its advertising rates repeatedly over the years. For example, from mid-year 1973 to mid-year 1974 alone, radio spot advertising rates rose 9%, and in the three years between mid-1971 and mid-1974 the rise in radio spot ad rates was 24%.[52] All these increases were far greater than the 1% increase that would be required if radio were to pass forward fully the proposed new performance royalty.

Although radio advertising rates have been raised periodically, the increase in these rates has been considerably *lower* than for prices generally. Although the Consumer Price Index rose 47% between 1967 and June, 1974, the rates for network radio ads rose 7% and those for spot radio ads rose 30%.[53] Thus the prices radio advertisers paid for their advertising rose much more slowly than the prices at which the advertisers sold their own products.

Even with these price increases, however, advertising costs *per thousand* of audience—which is a much more meaningful measure of cost than the rate per minute of time—are far lower for radio advertisers than for advertisers in print media.[54] For example, in 1974 the J. Walter Thompson Agency estimated that the cost per thousand readers for daily newspapers (1,000 lines black and white, all daily papers) was $7.85, and the cost per thousand for consumer magazines (one 4-color page in top 50 magazines) was $6.39. In contrast, the cost per thousand viewers for prime-time network TV (one 30-second announcement) was $2.54, and the cost per thousand listeners for daytime spot radio (25 adult Gross Rating Points)[55] was $1.91.[56]

It is important to recognize that radio has distinct advertising advantages. A vice-president of Goodyear Tire is quoted as saying, "Radio and television may constitute the most satisfactory media buys during this period of inflation."[57] He reasoned that the price of paper has zoomed, the wages of printers have escalated, and the price of postage is climbing. He pointed out that radio and television have "considerable latitude" in their cost structure, in contrast to the built-in costs of direct mail and other print media that work against adjustable rates. In addition, radio provides important advantages to advertisers wishing to reach specific local markets such as teen-agers, ethnic groups, and commuters. Radio also reaches important segments of local markets that are not inclined to read newspapers. Radio's appeal to advertisers is enhanced by the medium's focus on local rather than national advertising: In 1973, local sales provided 73% of radio advertising.[58] This focus enables radio to profit from the overall trend among advertisers to emphasize local more than national advertising. Local advertising expenditures in all media grew 70% between 1967 and 1973, while national advertising expenditures grew 35%.[59]

Many factors beside price affect an advertiser's choice of media. Among other things, the advertiser wants a medium that is appropriate for his particular product and his current advertising and marketing strategy. The effectiveness of a given medium in reaching the advertiser's target audience is a primary consideration. The advertiser is also concerned with the availability of openings in the various media, each medium's flexibility in placing and changing advertisements, and the risk associated with the various media. Radio advertising, for example, has the great advantage that ads can be prepared on short notice and with a minimum expenditure of time and money. This makes radio a particularly appealing medium to advertisers during a recessionary period when there is

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[52] "1974 75 Cost Trends," *Media Decisions*, August 1974, p. 45. As indicated earlier, both network and spot radio advertising are national, but with network ads, the advertiser is restricted to network-affiliated stations, while with spot ads the advertiser can select the markets to which he wants his message beamed.

[53] *Ibid.*

[54] In comparing the costs per thousand of these media, it is recognized (as we will show), that each offers different advantages and reaches different markets. However, what the comparison and the following discussion indicates is that for those advertisers whose needs are already best met by the broadcasting media, a 1% increase in the cost per thousand for those media is not only negligible in an absolute sense, but would surely not provoke a substitution effect toward print media which carry a cost per thousand that is 300% higher.

[55] A Gross Rating Point is the percent of the population in a market listening to a station during a time period times the number of announcements.

[56] "Television Advertising Stakes Out New Turf for Future Growth," *Broadcasting*, November 18, 1974, p. 22.

[57] Statement by Edward H. Sonnecken, Vice President, Corporate Planning, Goodyear Tire and Rubber Company, Akron, Ohio, summarized in "The dollars side of advertising gets going-over in Phoenix," *Broadcasting*, May 13, 1974, p. 4.

[58] According to *Advertising Age's* Research Department, total expenditures on radio advertising in 1973 were $1.7 billion, while local radio advertising expenditures were $1.2 billion.

[59] Based on advertising expenditure figures supplied by *Advertising Age's* Research Department.

uncertainty about markets, the size of companies' advertising budgets, etc. If, on the basis of all such considerations, an advertiser feels that a given medium is the most desirable for him, he will normally stick with that medium even if the medium's advertising rates rise.

For all these reasons, a small—1% maximum—increase in radio advertising rates to cover a performance fee paid performers and recording companies is not likely to have an appreciable effect on advertising sales in these media and is equally unlikely to promote substitution of other media. *Broadcasters, if they elected to pass on the performance fee, could become simply a conduit for placing the cost upon the advertisers.* In effect, the broadcasters could collect the fee from their advertisers and then transmit it to performers and recording companies. The fee would simply pass through the broadcasters' hand without affecting their financial situation. *The cost of the fee would, in effect, be paid by advertisers who are currently benefiting at no cost to themselves from the talent and money invested in recordings by performers and recording companies.* Furthermore, as we shall next show, such a fee even with a nominal markup by broadcasters would represent no great burden for advertisers.

The proposed performance royalty would have a negligible impact on consumer product costs

We have shown that it is equitable for radio stations who benefit directly from the playing of recordings, to pay for the commercial value they derive from the use of other people's property and creativity. It is equally equitable for advertisers to do so. Advertisers benefit from the fact that radio reaches a vast audience. This audience "pays", in a sense, for the free music on radio by listening to commercials. Advertisers should pay for the use of recordings that attracts this audience for their commercials. Artists and recording companies deserve compensation for the indispensable contribution they make to the selling of cars, cosmetics, and the host of other products advertised on radio.

If broadcasting companies raised their advertising rates to cover a performance fee paid to artists and recording companies, the impact on advertisers' budgets, and ultimately on product costs would be negligible. For example, the Ford Motor Company, one of the top ten radio advertisers in the country, spent $13.9 million on network and spot radio ads in 1973.[60] Suppose, as an illustration, Ford even spent an equal additional amount on local radio ads. Then its total expenditures for radio advertising in 1973 would have been around $28 million. If the advertising budget had to be increased by 1% ($280,000) to cover the pass-through of the performance fee from radio broadcasters, and if Ford passed these costs on to the consumer, the impact on one of the roughly 2 million vehicles Ford produces every year would be minuscule. Indeed, the impact of any markup on this total taken by broadcasters would also be minimal. It is far more likely for the sum to simply be absorbed within Ford's operating budget.

Similarly, the Coca Cola Company, another major radio advertiser, spent $8.3 million on national network and national spot radio ads in 1973.[61] If Coke spent even an equal, additional amount on local radio ads, its total radio advertising expenses might approximate $16.6 million. A 1% increase in these costs would equal $166,000. Again, it is most likely that this sum would be lost in the costs of Coke's doing several billion dollars worth of business each year. However, if this increase due to a performance royalty were passed forward to the consumer in a general price increase, the performance right's share would represent a minute 0.0079% increase in prices ($166,000 divided by Coca Cola's 1973 sales of $2.1 billion). This sum, spread out over billions of bottles of Coke, would be imperceptible to consumers and wholesalers alike.

In short, *the impact on consumer product costs of the proposed performance fee for performers and recording companies would scarcely be perceptible* either to advertisers or to consumers, even if the new fee were passed forward fully. *No appreciable effect would be felt on consumer prices.*

Television stations should also pay for their use of sound recordings

Television stations also make use of recorded music, particularly as theme songs and background music for their programs. Although audiences may be less conscious of the music on television than on radio, television's performance royalty payments to composers and publishers actually exceeded those of radio in 1973,

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[60] According to "Advertising, Marketing Reports on the 100 Top National Advertisers," *Advertising Age*, August 26, 1974, pp. 27ff. Ford spent $13.9 million on network and spot radio ads in 1973 and had sales of $23 billion.

[61] According to *Advertising Age*, August 26, 1974, p. 27ff. Coca Cola spent $8.3 million on network and spot radio ads in 1973 and had sales of $2.1 billion.

the last year for which data are available. Total music license fees paid by television exceed $41.5 million in that year. It is no doubt true that a higher proportion of this total amount was for live performances than was true for radio; nevertheless, use of recorded music is substantial.

Just as composers and publishing corporations are entitled to compensation for the use of their music on television, so artists and record makers are entitled to compensation for the use of their copyrighted recordings. The performance royalty prescribed in this bill would require television stations to pay only token sums to recording companies and artists. Television stations with annual revenues of $1 to $4 million would pay only $750 a year, and stations with revenues over $4 million would pay $1,500 a year. Total television payments, which would be divided between artists and recording companies, would equal $429,000—less than one-tenth of one percent of television station profits in 1973. (See Exhibit 7 below.)

Television is a highly profitable industry and would scarcely feel the pinprick of such small performance royalties paid artists and record makers.

Total television pre-tax profits rose 58% between 1967 and 1973.[62] (See Exhibit 8 on page 1331.)

Television enjoys an unusually high profit level. In 1973, television's pre-tax profits were 18.8% of its revenues.[63]

Advertising dollars spent on television rose 54% between 1967 and 1973.[64] The Commerce Department predicts that television revenues will grow about 9% a year between now and 1980.[65]

Unlike radio, television's growing revenues appear to be the result of increases in its advertising prices rather than increases in the amount of time it sells, largely because available time is frequently sold out. Network television advertising revenues rose 35% between 1967 and 1973, a period during which the cost per minute of advertising on nighttime network TV rose 47%, and on daytime network TV, rose 33%.[66]

EXHIBIT 7

PERFORMANCE ROYALTY TV STATIONS WOULD PAY RECORDING COMPANIES AND ARTISTS UNDER S. 1111—H.R. 5345

	Number of stations	Annual performance royalty per station	Total performance royalty paid per year
Television stations with revenues of $1,000,000 to $4,000,000	304	$750	$228,000
Television stations with revenues over $4,000,000	134	1,500	201,000
Total	438		429,000
Total 1973 pretax profits of television stations with annual revenues above $25,000 (excluding networks) [1]	622		468,800,000
Performance royalty as percent of pretax profits			0.09%

[1] TV stations with revenues over $1,000,000 have 93 percent of all TV station expenses and probably an even higher percentage of TV station profits since 81 percent of the stations in this revenue category are profitable, while profits are enjoyed by only 48 percent of the stations with revenues under $1,000,000.

Source: FCC, "TV Broadcast Financial Data—1973."

[62] According to the FCC's annual *TV Broadcasting Financial Data,* television pre-tax profits rose from $414.6 million in 1967 to $653.1 million in 1973.

[63] FCC's annual reports on Broadcast Financial Data for TV.

[64] According to the Research Department of *Advertising Age,* television advertising revenues rose from $2.9 billion in 1967 to $4.5 billion in 1973.

[65] FCC's annual reports on Broadcast Financial Data for TV.

[66] According to the Research Department of *Advertising Age,* network television revenues were $1,455 million in 1967 and $1,968 million in 1973. Network ad price indices are from "1974–75 Cost Trends," *Media Decisions,* August 1974, p. 45.

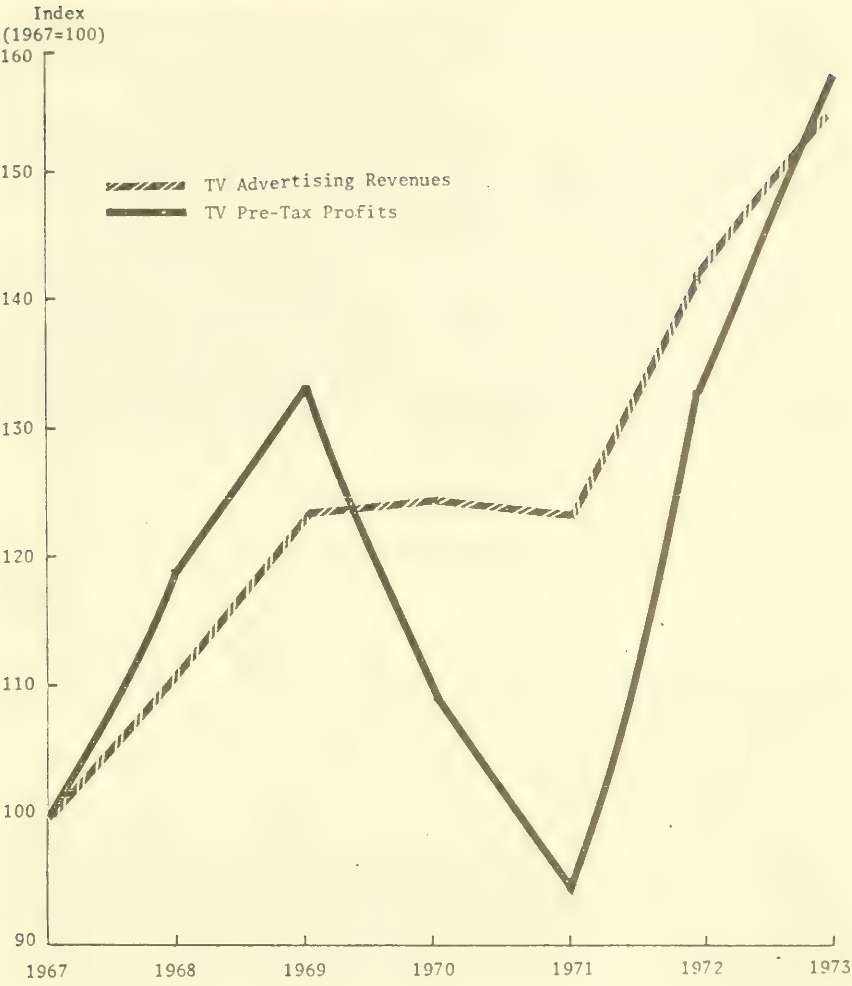

EXHIBIT 8.—*Television revenues and pretax profits 1967–1973*

Sources: FCC's annual report on TV Broadcast Financial Data.
Research department of Advertising Age.

Television's audience has been growing. Between 1968 and 1973 the audience for nighttime network TV grew 8% while the audience for daytime network TV grew 26%.[67] Because of the growth in television audiences, television ad costs per thousand viewers grew more slowly than did ad costs per minute: cost/1,000 viewers rose 12% for daytime network TV and 20% for nighttime network TV.[68]

Television profits are so high that the industry could absorb the entire performance royalty proposed in this bill, and its income statement would remain virtually unchanged. *If television paid the royalty entirely out of its profits, television stations with revenues above $25,000 would continue to enjoy a 22.7% pre-tax return on sales.* (The rate would merely ease from 22.76% to 22.74%.)[69]

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[67] "Broadcasting in 1975: Shipshape in a Shaky Economy," *Broadcasting*, January 13, 1975, p. 35.

[68] "1974–75 Cost Trends," *Media Decisions*, August 1974, p. 45.

[69] Television stations with annual revenues of $25,000 or more, had net revenues of $2,059,847,000 and pre-tax profits of $468,803,000 in 1973, according to the FCC's "TV Broadcast Financial Data—1973" (August 1974).

If television stations should elect to pass the new royalty on to advertisers in higher rates, the increase in rates would be so slight that it would be unlikely to affect television ad sales or to have any appreciable effect on advertisers' budgets or on consumer prices.

The proposed royalty will not affect composers and publishing companies

No suggestion is currently being made that the performance fees radio and TV broadcasting stations now pay to composers and publishing companies should be reduced if the stations should be required to begin paying performance fees to performers and record makers. The new performance fee would simply increase the total payments that stations already make for the use of recordings.

The performance fees paid composers and publishing companies have been growing rapidly. Between 1963 and 1973, the performance fees collected by U.S. composers and publishing companies nearly tripled, rising from $40.5 million to $114.4 million. (See Exhibit 9 on the next page.) These performance royalties are almost 4% of broadcasters's revenues, and, as broadcasters' revenues have grown, the royalties have escalated. The U.S. Commerce Department predicts that both radio and television revenues will grow by about 9% a year between now and 1980.[70] Because the performance royalties earned by composers and publishing companies are tied to revenues, these interested parties may be expected to enjoy an expanding royalty base in the years to come.

EXHIBIT 9.—*Income to composers and publishers from recordings, 1973 versus 1963*

[Dollar amounts in millions]

	1963	1973	Percent increase, 1963–73
Estimated total performance fees paid U.S. composers and publishers	$40.5	$114.4	+182
Estimated total copyright fees	44.5	117.1	+163
Estimated copyright fees paid by U.S. record companies	37.6	82.1	+118
Estimated copyright fees received by U.S. composers and publishers from foreign record companies	6.9	35.0	+413
Estimated total income received by U.S. publishers and composers from both copyright and performance fees	85.0	231.5	+172

Sources: 1963 figures are from the 1965 Glover report before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. House of Representatives, 89th Congress, 1st Session. The 1973 figure for mechanical fees paid by U.S. record companies was calculated from statistics supplied to RIAA by 34 record companies representing about 98 percent of the industry's sales. The actual 1973 mechanical fee payments reported by these companies was $80,400,000, but the figure for the entire industry is estimated to be $82,100,000 (80,400,000 divided by 96 percent). The 1973 figure on foreign mechanical fees was estimated from "Billboard" reports about sales abroad of recordings of U.S. music. 1973 performance fees were calculated as follows: $37,500,000 in music license fees paid by radio stations and networks (FCC figures); $47,800,000 in music license fees paid by TV stations and networks (FCC figures); $19,400,000 in ASCAP receipts from: general and background music; symphonic and concert music; and royalties from foreign societies (ASCAP figures); $9,700,000 estimated BMI and SESAC receipts from these 3 sources (estimated to be roughly half ASCAP receipts).

CONCLUSIONS: PERFORMANCE RIGHTS SHOULD BE GRANTED TO RECORD MAKERS AND PERFORMERS

The general Copyright Revision Bill grants performance rights to every performable copyrighted work except sound recordings.

Both record makers and performers make a major creative contribution to recordings and their creative contribution merits full copyright protection.

Almost every other Western nation pays performance royalties to performers and record companies.

Broadcasters should pay performers and record makers for the commercial value they extract from sound recordings.

The broadcasting industry enjoys high profits, in part because of its use of recordings at little cost, and the industry could pay the small performance royalty proposed without seriously impairing its profitability.

Because they do not now make such payment, advertisers, in turn, are indirectly benefiting from music programming on radio and television at rates

[70] U.S. Department of Commerce figures cited in "Government Report Plots Good Growth Through 1980 for Radio, TV, Cable," *Broadcasting,* November 11, 1974, p. 48.

which do not reflect the true costs of the talent and money invested in recordings by performers and record companies.

The profit position of the broadcasting corporations could be preserved by passing forward the costs of the proposed new performance royalty to their advertisers who are the ultimate beneficiaries, without decreasing the attractiveness of the media.

If advertisers in turn passed on the costs of a performance royalty to the consumer, the impact would be imperceptible.

Mr. Gortikov. It is a traditional copyright concept that one who uses another's creative work for profit must pay the creator of that work.

A sound recording is a copyrightable, creative work. It is the product of the creative efforts of vocalists, musicians, composers, and recording companies. Under the 1909 copyright law, only the publisher/composer is paid a performance royalty when a broadcaster plays a record containing that composer's tune. The rest of the creative team, however, that is, the performing artists and recording company, are paid nothing when the product of their creativity—that is, the sound recording itself—is used for gain by another.

This makes no sense. Congress has already recognized on two separate occasions—once in 1971 and again in 1974—that the sound recording does bear all the elements of a copyrightable product. Yet, as the general revision bill now stands, the sound recording is the only copyrighted creative work for which a royalty will not be paid when it is performed by others.

Significantly, the revision bill does grant new performance royalties to broadcasters from cable TV. And the bill grants new performance royalties to composers when sound recordings are played by jukeboxes. The performing artists and recording companies deserve to be included too, and for the very same reasons.

Ironically, our strongest allies in advocating this principle to Congress are the very same broadcasters who oppose this legislation.

Only last month, broadcasting spokesmen appeared before this subcommittee to support this same principle. The broadcasters seek payments from cable television whenever cable uses broadcasters' copyrighted program material for profit.

One of the broadcaster representatives testified: "It is unreasonable and unfair to let the cable industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime. That offends my sense of the way things ought to work in America." So spoke the broadcaster.

We of the recording industry maintain that it is likewise unreasonable and unfair to let the broadcasting industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime.

Broadcasters expect payment when their copyrighted programs are used for another's profit. So do we. Broadcasters aggressively seek copyright payments when they take risks and make investments. We do, too. And the recording industry, like the broadcasting industry, wants equitable payment when its product is used by broadcasters to build audiences, sell commercial time, and build station equity values.

When it is in their economic interest, the broadcasters support the principle of rewarding creators. When it is not in their economic interest, the broadcasters oppose it, as they do now. This is neither

logical nor fair. We respectfully suggest that Congress not allow the broadcasters to have it both ways.

The broadcasters will tell you that they should not have to pay a performance royalty, because airplay helps sell records. They will remind you that record companies actively seek airplay of new recordings. As you may know, a few record promoters may not have used good sense in seeking airplay, and may have been in violation of the law. Their alleged misdeeds, however, are certainly not representative of the business behavior of the thousands of persons in the recording industry.

Certainly, record companies do seek airplay on new recordings, so the broadcaster argument may sound good. It is a hollow and deceptive argument, however, if you examine all the facts that I now offer.

Fact No. 1.—Radio stations do not use recordings for their programing to do record companies a favor. They use recordings because that is the best way, in their judgment—in their judgment—to build audiences, advertisers, profits, and station equity.

Fact No. 2.—Sound recordings are the mainstay of most radio programing. More than 75 percent of radio program time is devoted to recordings.

Fact No. 3.—Most recordings get zero sales benefit from airplay. The vast majority of recordings never get airplay at all. A "Top Hits" radio station usually adds only five or six new songs a week to its play list—out of more than 900 new recorded tunes released weekly.

Fact No. 4.—More than 75 percent of all recordings released fail to recover their costs. Only about 6 percent make any real profits, and they must carry the load for all the rest. Classical recordings fare even worse. Over 95 percent of classics lose money.

Fact No. 5.—Some 56 percent of all recordings played on the radio are older recordings which do little or nothing to generate more record sales, though they help radio's own goals.

Fact No. 6.—Although recording companies want their new product airplayed, they certainly are not out for a free ride. Recording companies today are among the major purchasers of commercial advertising over radio and TV. In 1972, for example, recording companies paid out to radio stations over $32 million for commercial advertising. And in 1974, the recording industry spent nearly $65 million for television advertising. By way of contrast, the estimated annual yield to recording companies from performance royalties would be about $5 million, even less than that in early stages.

Fact No. 7.—Broadcasters pay for virtually every other form of programing they employ, except for sound recordings. That includes news services, dramatic shows, disc jockeys, personalities, sports shows, game shows, syndicated features, weather, commentators, financial and business services. Yet, they pay nothing for the recordings which furnish 75 percent of their programing.

Mr. Kastenmeier. Mr. Gortikov, you have exceeded your 6-minute allocation and apparently you do have a long statement which will take many, many more minutes to complete. So I——

Mr. Gortikov. Sir, I wasn't aware of the 6-minute allocation. I have about 11 minutes in my presentation.

Mr. Kastenmeier. I'm sorry. Whoever is coordinating this on your side apparently is not on the job.

Mr. GORTIKOV. And I also, if I may——

Mr. KASTENMEIER. Let me indicate this. My counsel has been in touch with Mr. Fitzpatrick. I think it is understood that you are allotted 30 minutes as a panel. The following allocation of time is indicated: Mr. Sanford Wolff, 15 minutes; Mr. Stanley Gortikov, 6 minutes; Robert McGlotten, or anyone else for the purpose of a presentation or statement by the AFL–CIO, 3 minutes; Mr. Hightower, 3 minutes; and Mr. Bikel, 3 minutes, totaling 30 minutes. If you are not well coordinated, for that I am sorry.

I make that announcement for the other side, too, the allocation of time so that you can measure your statements accordingly.

Is there someone there on the panel who desires to make a presentation? Is Mr. McGlotten here this morning?

Mr. GOLODNER. No, he is not, Mr. Chairman, and I will be happy to submit the statement for the AFL–CIO.

Mr. KASTENMEIER. Would you do so.

Mr. WOLFF. Mr. Chairman, is it out of order for me to suggest that perhaps I had not utilized my entire 15 minutes? I don't believe I did. Perhaps Mr. Gortikov could utilize them.

Mr. KASTENMEIER. All I know is that you were alloted 15 minutes, Mr. Wolff, and I am not sure whether you consumed all 15 minutes. Perhaps counsel could tell me?

Mr. FUCHS. It was close to that.

Mr. WOLFF. Sorry. If it was out of order, please forgive me.

Mr. KASTENMEIER. Do you wish to read the statement from——

Mr. GOLODNER. No, Mr. Chairman. To save time I have tried to merely hit the highlights. You have a letter from Mr. Andrew Biemiller, legislative director of the AFL–CIO, who unfortunately is committed to appear before another committee at this time and regrets that he can't be here personally.

Mr. KASTENMEIER. Without objection, that letter will be received.

Mr. GOLODNER. If I can do that, Mr. Chairman, I think it will save time.

Mr. KASTENMEIER. And the Chair will observe that the letter—the basic point of the letter is that the AFL–CIO strongly supports efforts of America's performing artists to achieve, through our copyright laws, proper recognition of the immense contributions they make.

[The material referred to above follows:]

AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Washington, D.C., July 22, 1975.

HON. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: The AFL–CIO strongly supports the efforts of America's performing artists to achieve, through our copyright laws, proper recognition of the immense contributions they make to the culture of our nation and the profits of those who utilize their recorded work for commercial exploitation. The basic principles underlying H.R. 5345, if embodied in H.R. 2223, would provide such recognition and we urge this committee to amend H.R. 2223 accordingly.

The legal, moral and economic arguments martialed by these artists and their unions have been well documented in extensive hearings conducted during the last decade by this committee and by its counterpart in the Senate. Indeed, in its 1966 report, this subcommittee specifically noted the arguments

of the American Federation of Musicians and others in behalf of the performers' rights to remuneration from the exploitation of their sound recordings and commented that "there was little direct response to these arguments". There can be even less of a valid response today.

The Congress and the courts have now clearly established that a sound recording can be the subject of copyright protection. Expert testimony from some of the world's leading artists, the National Endowment for the Arts, and the Register of Copyrights support the contention that the artist is, indeed, a creator or "author" of such recordings and, as such, is entitled to the consideration provided for in the Constitution.

And, in recent months, even the broadcast industry has echoed the artist's arguments for equity, though it appropriates them solely for its own interests.

On July 8, Mr. Arthur Taylor, President of CBS, told the Senate Subcommittee on Antitrust and Monopoly that he was "concerned" about cable television "because it operates outside the copyright structure, profiting from attractions of free television, but not paying for them". Similarly, America's performing artists and their unions are concerned that the broadcasters and their advertising sponsors, juke box operators and background music organizations are profiting from the commercial use of recordings but are not paying appropriately for them. Mr. Taylor also told the Senate Committee that 85% of what cable television provides its viewers is what is received at no cost from the broadcasters. Because of this, he labeled CATV "a parasitic medium". Similarly, 75% of radio programming consists of recordings without payment to those who made the recorded works possible and this practice, too, must be condemned.

H.R. 2223 addressed the problem of the broadcaster vis-a-vis CATV while it ignores the comparable problems of the recording artist. Such a discriminatory approach is inexplicable and is a serious flaw in the legislation.

The overwhelming number of performers who make possible the recorded works we enjoy and take for granted almost every day of our lives are not famous and wealthy. Quite the contrary, they pursue professions that are among the lowest paid and highly unemployed in the country. According to the 1970 census, America's musicians earned a median annual income of $4,668. The unions representing these professional people indicate that more than 80% of their membership is generally unemployed. Only the few, very famous stars achieve notoriety and economic security while the thousands of supporting artists who contribute so much to a recorded performance remain unknown and confront an uncertain future. In part, the severe unemployment they face can be attributed to the fact that their own recordings have been used to displace them from broadcasting, cafes, restaurants, and other places where their work is employed but, thanks to recordings, they, themselves, are not.

While the right to royalties being discussed here will not create new job opportunties, it will insure that these people are justly rewarded for their labor and encouraged to continue in their creative professions.

The record buyer, too, would benefit. At present, almost the entire cost for developing, producing and distributing recorded programs, as well as paying the artists, is borne by the millions of individuals who buy records for their own personal enjoyment. The broadcaster, who turns around and sells these programs for profit, and the commercial sponsor, who uses them as a vehicle to promote his business, contribute no more, and sometimes less, than the individual consumer.

We believe this current practice is not only unfair to the artist, who is offered no compensation from the profits earned by his labor, but unfair, as well, to the average record buyer, who now bears the total cost of making recorded programs.

We have discovered that it comes as a surprise to most people that the performers receive absolutely nothing from the profitable uses made by broadcasters, juke box operators and other purveyors of their recorded work. It is inconceivable to many of them that anyone should be permitted to profit from the work of others without making some form of payment. They are shocked to learn that not one dime of the many millions spent by commercial advertisers, juke box patrons and office building managements to provide musical programming is received by the artists who make the music possible.

In a resolution adopted by the 8th Constitutional Convention of the AFL-CIO, it was pointed out that "through the media of films, television and recordings, the art of the performer can now be carried to huge masses of people. There is a danger that the middle men—those who control the media—will reap all of the

profits and the performers will see little, if anything, of the rewards for benefitting such vast audiences. Such a situation must not be allowed to occur. Despite the profound advances which have been made in technology and the changes which they herald, our government has been shockingly lax in bringing the laws of copyright into tune with the times." Therefore, the convention endorsed proposals then pending before Congress "which would assure the right of the performing artist to compensation for the broadcast and commercial exploitation of his recorded work. We believe this is fair", the convention said, "we believe this is just and must not be denied."

In 1966, this subcommittee put off a decision regarding the performance rights question saying, in its report, that it did not foreclose "the possibility of a full consideration of the problem by a future Congress."

Today, five Congresses later, America's recording artists are again petitioning for the redress of a very serious grievance. They have waited long enough.

The AFL–CIO firmly believes their request is justified and cannot be avoided any longer if the Congress truly intends to bring the nation's copyright laws into tune with the times.

Sincerely,

ANDREW BIEMILLER,
Director, Legislative Department.

Mr. KASTENMEIER. Then as a panel you have 9 minutes remaining. Now, Mr. Hightower has 3 minutes, Mr. Bikel 3 minutes, and Mr. Gortikov, if you prefer that he continue to summarize his statement, because he has not concluded, that is acceptable.

Mr. WOLFF. Well, I certainly would like to hear from Mr. Bikel, but if there are 3 minutes of Mr. Biemiller's or Mr. Hightower's statements, it seems to me there are another 3 minutes left, and I would hope that Mr. Gortikov could be given that opportunity to utilize the 3 minutes and summarize the balance of his statement.

Mr. KASTENMEIER. All right.

Mr. WOLFF. Thank you very much.

Mr. GORTIKOV. OK. To continue, so only some recordings played over the air benefit performers and companies. But all recordings played over the air benefit the broadcasters.

But the performance royalty principle in the copyright law is not conditioned on who benefits from what. If the principle is valid that one should be compensated for the commercial exploitation of his creative product, then the musicians, vocalists, and the recording company are entitled to a performance royalty.

Broadcasters may suggest that they cannot afford to pay a performance royalty. Or that the fee schedule would hurt smaller stations.

The radio and television industries are growing and prosperous. Their revenues, profits, and equity values over the years all have been increasing.

The fee schedule established in this legislation is quite modest when you remember that 75 percent of radio programing is based on sound recordings:

1. Radio stations with net advertising revenues of $25,000 a year would pay nothing—or below.

2. Radio stations with revenues between $25,000 and $100,000 would pay $250 a year, or about 75 cents a day.

3. Stations between $100,000 to $200,000 would pay only $750, or about $2 a day.

4. Stations with revenues of more than $200,000 would pay a maximum of 1 percent of their annual net income from advertisers, or some lesser percentage based on their actual usage of recordings.

Under this fee schedule, 62 percent of all radio stations would pay either nothing, or token fees, ranging from 75 cents to $2 a day. And 38 percent of stations would pay a performance fee of up to 1 percent. This 1 percent is a small sum indeed compared with the 3.7 percent that the radio stations voluntarily agree to pay publishers and composers through ASCAP, BMI, and SESAC.

Remember, too—and this is a critical statement—that if a station considers its fee to be unfair, that station has full discretion as to what it broadcasts. It need not play any records. It has the unilateral right to turn to any other form of programing of its choice.

We are here to ask you to make this legislation part of the general copyright revision bill. That is where it was previously. That is where it belongs. As the Senate Judiciary Committee said last year, there is "no justification for not resolving this issue on the merits at the present time. All relevant and necessary information is available."

I think I have hit my 3 minutes, Mr. Chairman. I have more comments, but they are contained in my submission.

Mr. KASTENMEIER. Thank you.

Mr. DRINAN. Mr. Chairman, one question to clarify what is really in issue here, if I may.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. Later on the president of the National Association of Broadcasters says they are being asked now to give an additional 1 percent and he states they already pay 3.5 percent to SESAC and ASCAP. What is the 1 percent? One percent of net? One percent of gross? Or how does that 1 percent come out that you mention here "Pay the full performance fee of up to 1 percent?"

Mr. GORTIKOV. OK. It is 1 percent of net advertising revenues and it is in addition to the 3.5 percent they are currently paying to composers or publishers. So the 1 percent is but a modicum of the amount paid for the music. And it is a separate payment we are requesting in behalf of vocalists, musicians, and recording companies.

Mr. DRINAN. If 38 percent of the stations would have to pay that, how much does that come to total?

Mr. GORTIKOV. We estimate if the full yield is made under that schedule, there would be about $10 million per year that would be shared by the vocalists, musicians, and recording companies.

Mr. DRINAN. In addition to what they pay ASCAP?

Mr. GORTIKOV. In addition to what they pay composers and publishers.

Mr. DRINAN. What does ASCAP and BMI say about that?

Mr. GORTIKOV. They stand silent on it.

Mr. DRINAN. Thank you, Mr. Chairman. That is all I want to know.

Mr. KASTENMEIER. Mr. Hightower.

Mr. HIGHTOWER. Mr. Chairman, I have prepared a statement. If there was no objection, I would like to have it presented for the record of the hearings, and I will just make my comments brief.

My name is John Hightower. I am chairman——

Mr. KASTENMEIER. Mr. Hightower, we have an editorial statement from you, but this is not the statement.

Mr. HIGHTOWER. That is not the complete statement. That is part of the statement for the record.

Mr. KASTENMEIER. Oh, yes. We have it here. Without objection your statement in its entirety will be received and made part of the record. We recognize you for whatever comments you want to make.

Mr. HIGHTOWER. Thank you. My name is John Hightower. I am chairman for Advocates for the Arts which is a group of 4,000 citizens throughout the United States concerned about the artistic life of the country. It functions as a program of Associated Councils of the Arts, which is an organization representing individuals, professional individuals, and art organizations including all of the State arts agencies and commissions throughout the country.

I want to urge that the subcommittee consider and include H.R. 5345 into, and make it a provision of, the comprehensive revision that is the subject of H.R. 2223.

I think probably the most compelling argument I can present was provided by the person I sat next to on the plane from Albany this morning. It happened that he is a composer of popular ballads, and when I told him why I was coming to Washington today, he said I certainly hope that provision is passed. As a composer, I would give anything if Barbra Streisand or James Taylor would perform one of my compositions.

The tradition has, of course, always been that the composer benefits whenever a work is used commercially.

The second point that I want to make is the fact that most of the debate this morning seems to center on the broadcasting industry as the opposition, but I would just like to point out for the record that jukebox operators and background music merchants also have a free ride, if you will, whenever work is performed by an interpretive artist commercially.

And finally, to summarize, I just want to say that the consequences of the new copyright law for the artistic life of the country are indeed profound and there is certainly an urgent need for Congress through a revised copyright law which hopefully will include a performance royalty for interpretive artists as well as creative artists to encourage artistic talent and to provide value for its expression through the legal protection and economic incentives of H.R. 5345.

Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Hightower.

[The prepared statement of John Hightower follows:]

STATEMENT OF JOHN HIGHTOWER, CHAIRMAN, ADVOCATES FOR THE ARTS

Chairman Kastenmeier, members of the committee:

My name is John Hightower. I am chairman of Advocates for the Arts, a group of 4,000 citizens throughout the country concerned about the artistic life of the United States. By definition our concern includes the rights and role in our society of artists—the source of the arts. Advocates for the Arts is a program of Associated Councils of the Arts, the national service organization for state and community arts councils; it has a professional membership of 900 organizations and individuals including all of the nation's state arts agencies and commissions.

I am grateful for this opportunity to present our views on H.R. 5345 currently before the House and S. 1111 in the Senate, both of which may eventually be considered amendments to the omnibus copyright bills, H.R. 2223 and S. 22.

The "performance royalty" that is the subject of H.R. 5345 and S. 1111 would compensate both the originator of a work and the interpreter of that work when any material is presented for commercial use on recordings, juke-boxes, radio, television, motion pictures, background music—in all media. This provision would

correct an omission that is now present in the comprehensive copyright legislation that will, we hope, be passed by the 94th Congress.

It would be cruelly ironic if the extensive and long-awaited revision of the 1909 Act were resolved in favor of those individuals and organizations who use creative material for commercial gain and yet simultaneously left out those individuals who make a creative contribution to artistic material. Clearly it was creativity that the Constitution was specifically trying to protect and encourage when it gave to Congress in 1789 the power ". . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ."

WHY THE PERFORMANCE ROYALTY IS IMPORTANT

The arguments for passing a performance royalty are uncomplicated, but, as always subject to misinterpretation and self-interest.

Less than 20% of all recorded works are successful—which means they earn more than they cost to record. The other 80% stimulate the growth and expansion not only of the recording industry, but of the nation's artistic life as well. Recording companies have one source of support—the individual consumer. Under current practices, those who benefit most from the recording industry's development are broadcasters and juke-box owners who pay the least for these benefits which yield them profit.

The debate can be clouded by tales of extraordinary sales of pop records and astronomical incomes of the latest and hottest rock group. These are momentary winners in the royalty sweepstakes. The consistent loser, however, is the consumer who buys individual recordings, for it is currently up to the consumer to bear the entire cost of the recording industry—including a performance royalty for interpretive artists while broadcasters, back-ground music merchants, and juke-box chains pay nothing.

Regardless of the fleeting popularity of most of our so-called popular artists, the income of pianists, violinists, singers, concert performers, dancers, opera companies, theater groups, and symphony orchestras is also affected. These artists and arts organizations should be compensated along with the composer and author every time a work in which they have a part is used commercially.

As Erich Leinsdorf, conductor of the Boston Symphony Orchestra, stated in his testimony for the Senate Copyright hearings in 1967, "When the artist performs twice in live performance, he is paid twice. If you perform six times, you are paid six times; but with a recorded performance my work can be 'exhibited' as often as the station likes—and the cost to the radio station will be the same, nothing. There is something wrong about this, there is no doubt about it.

". . . Radio stations will play recordings time and time again over many, many years, long after it is possible to buy that recording in a music shop. For the composer and the publisher this is not a problem as they continue to benefit from fees. But the performer gets nothing, even though in most instances it is the performers . . . who create the demand.

"And do not forget that . . . all sorts of music performers, particularly singers, have a limited time in their careers. One problem prevailing with singers . . . is that they have no way of depreciating themselves in the tax structure. It is not fair for others to be making a profit from performers' talents long after the performers stop receiving any income."

The incorporation of S. 1111 and H.R. 5345 into S. 22 and H.R. 2223 respectively would also allow United States copyright law to conform with the performance royalty clause of most other nations in the Western world.

I also urge that one more glaring inequity be corrected by the Committee. At the present time *public* broadcasters—radio and television alike—do not compensate composers whenever a work is performed. To compound this injustice technicians, musicians, administrators, and others involved in the operation of public broadcasting are compensated. Only the composer—the creative source of material—is not. The irony is extended even further as the result of a recent contract with the U.S.S.R. in which the Soviet Union *is* required to compensate any composer whose work is broadcast in Russia.

On behalf of Advocates for the Arts, I strongly urge the passage of S. 1111 in the Senate and H.R. 5345 in the House.

The consequences of a new copyright law for the artistic life of the country are profound. There is an urgent need for Congress, through a revised copyright

law, to encourage creative talent and to provide value for its expression through legal protection and economic incentive.

Mr. KASTENMEIER. The Chair would like to greet the distinguished American actor and artist and musician, an old friend of many of us in Wisconsin, Mr. Theo Bikel.

Mr. BIKEL. Thank you, Mr. Chairman. I hope 30 seconds were left over from John Hightower that I can grab in passing.

I, too, have a full statement which you have for the record.

Mr. KASTENMEIER. Without objection that will be received for the record. [See p. 1352.]

Mr. BIKEL. I will try to paraphrase and be brief.

Mr. Chairman, I appear here today not only as president of Actor's Equity Association, but also as an individual performing artist who, I hope, has more than a passing acquaintance with the problems and goals of the American recording artists. Frankly, we are appalled that H.R. 2223, which is heralded as an effort to update the 1909 copyright laws, ignores the impact of the recording on the performing or interpretive artist. When the present basic code was established in 1909 and debated, the work of the performing artist had not changed in its essentials. The performer would weave the magic of his unique talents when he wished, where he wished, for whomever he wished. His art, because it could not then be reduced to a tangible form, could not be stolen, could not be abused, distorted, or exploited by others.

Now, the advent of the phonograph record and of radio changed all that. The nature of the performer's performance is no longer ephemeral. It is something tangible, durable, can be repeated over and over again, and can even outlive the performer who originated it.

I would like you to understand, gentlemen, that the work, the rendering of the performance is not a recreative or reproductive act, but a creative act in itself, a work of art which is unique with every performer. It is so unique that it may never even occur again when attempted by the same performer. And that its uniqueness has been acknowledged far and wide.

Now, the broadcasters and others who profit from the work of the performers say that is not—the performer is not a creator of anything and I am amazed, too, with my colleague, Mr. Wolff, that they have the gall to come before you and ask you to disbelieve your own ears, to tell you, for example, that my rendering of a folk ballad is totally indistinguishable from that of Arlo Guthrie or Harry Belafonte or anybody else, for that matter.

The broadcasters do not take into consideration and seem to have great disregard for the thousands and thousands of job opportunities lost by innumerable unknown but talented American singers and musicians.

I find another aspect to be terribly ironic, the development of government programs on State, local, and Federal levels to employ musicians and singers to replace with government funds the opportunities denied to artists who have lost them because of the technological advances that have been made.

Now, the Congress on the one hand creates and supports programs for the arts and the artists and then effectively prevents them from sharing in the huge profits being made by others on his works.

I am not opposed to technological change. I am pleased that so many Americans can enjoy it, but I do resent it when somebody makes a profit, a very good one, without so much as a token payment.

Another inconsistency which may interest you as members of the Judiciary Committee is that H.R. 2223 faces up to the author's problem regarding the duplicating machine, even treats the broadcaster's problem regarding cable.

Why, then, should it persist in ignoring the performing artist's problem created by technological changes which weren't even invented before—which were invented long before cable and Xerox came on the scene. The bill would limit the copying of the printed word, but it perpetuates the practice of permitting the free copying of a performer's work over and over again for the profit of others.

This is inconsistent, it is wrong, and the reluctance of the Congress to face up to it is wrong.

I have just returned from Europe where I attended a conference on performance problems. I brought with me some papers which I have not had a chance to duplicate. I would like to enter them for the record. They are a general survey of the legal protection of performers in other countries. It is a little humbling to see that Argentina, Austria, Ireland, and Paraguay have protections we haven't dreamed of in terms of the very protection we are seeking here, and I would like to enter this for the record.

Mr. KASTENMEIER. Without objection that will be received.

Mr. BIKEL. Thank you.

[The material referred to above follows:]

PERFORMERS' PARTICIPATION IN THE REVENUE ACCRUING FROM THE BROADCASTING OF SOUND RECORDINGS IN EUROPE

Countries	Legal rights to remuneration for broadcasting of sound recordings	Collection and distribution	Performers' share (percent)	Performers' entitlement
Austria	Producers/performers.	LSG representing producers and performers.	50	LSG members and performers in other Rome convention countries.
Belgium	No rights	National Group of IFPI	25	Reserved since 1966 pending settlement of dispute under FIM agreement.
Denmark	Producers/performers.	GRAMEX representing producers and performers.	50	GRAMEX members and performers in other Rome convention countries.
Finland	do	Finnish GRAMEX representing producers and performers.	50	Finnish GRAMEX members.
France	No rights	National Group of IFPI	25	Reserved 1960–74 as a result of refusal by ORTF to designate performers entitled.
Germany	Producers/performers.	GVL representing producers and performers.	50	GVL members and performers in other Rome convention countries.
Ireland	Producers	PPL (Ireland) representing producers.	25	FIM union/Irish Transport and General Workers' Union.
Israel	do	National Group of IFPI	25	FIM union.
Italy	Producers/performers.	National Group of IFPI	50	FIM unions.

PERFORMERS' PARTICIPATION IN REVENUE ACCRUING FROM THE PUBLIC PERFORMANCE OF SOUND RECORDINGS IN EUROPE

Countries	Legal rights to remuneration for public performance sound recordings	Collection and distribution	Performers' share (percent)	Performers' entitlement
Austria	Producers/performers.	Collection by Austro-Mechana on behalf of producers and performers; distribution by LSG.	50	LSG members and performers in other Rome convention countries.
Denmark	do	Collection by KODA on behalf of producers and performers; distribution by GRAMEX.	50	GRAMEX members and performers in other Rome convention countries.
Finland	No rights	National group of IFPI collects and distributes revenue from copying of sound recordings for use by telephone service.	Nil	None.
France	do	SACEM collects and the national group of IFPI distributes revenue from copying of sound recordings for provision of background music.	25	Performers under contract to French record producers.
Germany	Producers/performers.	Collection by GEMA on behalf of producers and performers; distribution by GVL.	64	GVL members and performers in other Rome convention countries.
Ireland	Producers	No collection of public performance revenue to date.	Nil	None.
Israel	do	do	do	Do.
Italy	Producers/performers.	No collection of public performance revenue to date, SIAE has agreed to start collecting on behalf of producers and performers.	50	Italian performers and performers in other Rome convention countries.
Norway	Producers/performers.	Public performance users pay direct into fund.	80	Norwegian performers.
Spain	Producers	Collection by SGAE on behalf of producers; distribution by national group of IFPI.	10	FIM union.
Switzerland	No rights	Collection by Mechanlizenz of revenue from the copying of sound recordings for certain purposes on behalf of producers; distribution by national group of IFPI.	25	SIG representing Swiss performers.
United Kingdom	Producers	PPL collects on behalf of producers, and distributes to producers and performers.	32½	FIM union/individual performers under contract to PPL members.

Performers Participation in Remuneration Accruing from the Broadcasting and Public Performance of Sound Recordings in Europe

When considering the extent to which performers participate in the revenue accruing from performing rights, it may be useful to know a distinction between countries where the individual performers have a specific right to remuneration and other countries where, although they have no legal rights, performers do participate on the basis of voluntary sharing arrangements.

The Annexes attached hereto contain information in chart form relating to performing rights; amount of remuneration, how it is collected and distributed, and the extent to which performers participate in such remuneration.

I. Voluntary Sharing Arrangements

Performers participate on the basis of such arrangements in the United Kingdom and Spain, as well as in other European countries under the FIM/IFPI Agreement, 1954.

1. United Kingdom

Phonographic Performance Limited (PPL) is the organization set up by the United Kingdom record industry to collect and distribute all broadcasting and

public performance revenue on behalf of its member companies. As a result of a long-standing agreement with the Musicians' Union, the producers make voluntary payments to the performers amounting to 32½% of the broadcasting and public performance revenue:

(i) individual performers under contract with UK record companies, members of PPL, receive 20% of the sums received from broadcasting and public performance by the respective record companies on the basis of needletime;

(ii) the British Musicians' Union receives 12½% of the total net distributable revenue for use for the benefit of the musical profession and benevolent purposes.

2. Spain

The remuneration due to the record producers is collected from the broadcasting stations by SGAE, which also collects remuneration from the public performance users in Spain. After deduction of its handling charges, SGAE pays the monies it has collected to the National Group of IFPI. The Musicians' Union in turn receives 10% of that remuneration from both broadcasting and public performance.

Agreement concluded on the 11th March 1954 between IFPI and the International Federation of Musicians. A copy of this Agreement in Italian is enclosed herewith. Broadly speaking, the Agreement provides that where there is no legislation granting rights in this respect to performers, the record producers, as represented by IFPI, have voluntarily agreed to pay to the organisations specifically representing performers in their respective countries 25% of the revenue from the broadcasting of sound recordings.

This Agreement has not been extended outside Europe, except for Israel. However, at present it is only applicable in the following countries: Belgium, France, Holland, Ireland and Switzerland. This is so because the Agreement does not apply in countries which have legislation specifically granting performing rights to performers, and there is a clause in the Agreement providing for its automatic termination whenever performers are granted such legal rights.

The monies thus paid to the performers' organisations under this Agreement must be used "for the benefit of performing musicians", although a small percentage may be used for the organisation's administrative purposes.

II. PARTICIPATION PURSUANT TO RIGHTS GRANTED BY NATIONAL LAW

Similar considerations are involved in the collection and distribution of revenue from performing rights in the three Scandinavian countries, Denmark, Finland, and Sweden. The law is almost identical in all three countries, granting individual rights to remuneration to producers and performers with the provision that the performers' share shall be claimed through the producer. The situation in these countries may be contrasted with that in Germany.

1. Denmark

GRAMEX, a joint association representing producers and performers, administers their performing rights in Denmark. The broadcasting revenue is distributed to individual producers and individual performers on the basis of needletime. The individual performers' shares are worked out by means of a highly sophisticated computerized system, involving scales according to which royalties are shared proportionately between soloists, orchestras, conductors, etc.

Remuneration for public performance is collected through KODA, which, after deducting its handling charges, passes the remainder on to GRAMEX. Since it is not possible to trace the specific records publicly performed, GRAMEX distributes 50% of the remuneration to individual record producers according to each record labels' share of the market, and the remaining 50% is distributed collectively to the various performers' unions. GRAMEX pays the following organisations which participate on a percentage basis:

Danish Musicians' Union 40%; Danish Conductors' Society 15%; Danish Choir Organisation 10%; Soloist Organisations (through the Joint Council of Performing Artists) 15%; Danish Actors' Union 15%; and 5% reserved for the category of performers not belonging to any of the above organisations for these purposes.

2. Finland

The situation is very similar to that in Denmark, except that the Finnish GRAMEX distributes only broadcasting revenue, again on the basis of needle-

time. It would appear that performers do not participate in the additional revenue from the copying of sound recordings for use by the telephone service.

3. Sweden

The situation in Sweden differs slightly from that in Denmark and Finland. Not only does the law grant a right to broadcasting remuneration only, as in Finland, but there is no joint organisation representing producers and performers administering these rights in Sweden. The broadcasting revenue is paid to the National Group of IFPI, 50% of which is distributed to individual producers on the basis of needletime. The remaining 50% is paid to SAMI, the performers' organisation, whose responsibility it is to pay the individual performers similarly on the basis of needletime.

4. Germany

Pursuant to the provisions of the national law which grants performers the right to remuneration and provides that producers shall be entitled to a share, the producers and performers established a joint organisation called Gesellschaft zur Verwertung von Leistungsschutzrechten (GVL) to administer their performing rights in Germany.

The broadcasting stations send GVL details of the amount of use they have made of the respective record labels, but not of the individual records. The remuneration is distributed to the individual record producers according to the proportions as shown on these lists; however, such information from the broadcasting organizations does not enable GVL to distribute the remaining 50% to individual performers on the basis of needletime, as is the case in other countries.

Broadcasting and public performance revenues (the latter being collected through GEMA) is therefore distributed by GVL to the individual performers entitled on the basis of the recording fees paid by the producers to the individual performers during the preceding year. This involves performers submitting forms to GVL listing all recordings participated in and fees received. There is, however, a ceiling preventing higher paid performers receiving more than a certain percentage. 5% of the total broadcasting and public performance remuneration is declared undistributable and paid into a fund for social purposes.

Reciprocal agreements have however been made concerning the remuneration due to foreign performers under Article 12 of the Rome Convention between GRAMEX, SAMI and GVL, and GRAMEX is also negotiating with LSG in Austria. These agreements are based on what is known as the London Principles (a copy of these Principles in French is enclosed herewith). IFPI and the International Federation of Musicians reached agreement on these Principles at a meeting in London in February 1969. The first two Principles govern the situation where broadcasting or public performance revenue is for some reason undistributable, in which case it shall be used for the general benefit of the musical profession as a whole. The third Principle provides that broadcasting or public performance revenue which cannot be distributed because the necessary information is not available, or because the beneficiary cannot be traced, shall be retained in the country in which it has arisen.

Under the Agreement between GRAMEX and SAMI, SAMI distributes the broadcasting revenue collected by GRAMEX in Denmark to Swedish performers, and vice-versa. But under the Agreements which GVL has made with GRAMEX and SAMI, the London Principles have been extended to the whole field of remuneration and each organisation has agreed to keep all the money collected on behalf of the other which would otherwise have been due to performers in that country.

III. INDIVIDUAL VERSUS COLLECTIVE DISTRIBUTION

There is, however, one remaining problem which should be mentioned in connection with the performers' participation in remuneration from performing rights, namely the question of individual versus collective distribution. The FIM philosophy has always been that such remuneration is only compensation for the exploitation of commercial sound recordings which deprive musicians of opportunities of employment, and therefore should be used for collective purposes and for the benefit of the musical profession as a whole.

FIM pressed hard at the Diplomatic Conference which adopted the Rome Convention in 1961 for its philosophy to be written into Article 12. However, it is clear from the records of the Conference that both the "social" philosophy and the "individual" philosophy are permitted under the Convention and it is open to each country to decide which to adopt. Furthermore, despite FIM's atti-

tude to individual participation, it has not prevented it becoming the practice in many countries for rights to equitable remuneration to be granted to individual performers, for example, in Austria, Denmark, Finland, Germany and Sweden.

However, certain difficulties have arisen regarding the international application of Article 12 of the Rome Convention in countries where the law grants individual rights to performers and a partial solution to this has been found in the London Principles referred to above.

GENERAL SURVEY ON THE LEGAL PROTECTION OF PERFORMERS

Countries where performers are protected under legislation	Legislation at present in force	Legal rights granted to performers	Duration of protection (if any)
Argentina	Law No. 11.723 of 1933 on copyright as amended on 2d December 1974.	(1)	
Austria	Copyright Act of 1936, as amended on 16th December 1972.	(2 3)	50 years.
Brazil	Law No. 5988 of 14th December 1973 on copyright.	(2 3)	60 years.
Chile	Decree Law No. 17.336 of 28th August 1970 on copyright.	(1 2 3)	30 years.
Colombia [4]	Law No. 86 of 26th December 1946 on copyright	(1)	
Congo	Rome convention	(2)	20 years.
Costa Rica	do	(2)	Do.
Czechoslovakia [4]	Law No. 35 of 25th March 1965 on copyright	(2 3)	25 years.
Denmark [4]	Law No. 158 of 31st May 1961 on copyright	(2 3)	Do.
Ecuador	Rome convention	(2)	20 years.
El Salvador	Decree No. 876 of 6th September 1963 on copyright.	(1)	
Fiji	Performers' Protection Ordinance No. 13 of 20th June 1966.	(2)	
Finland [4]	Law No. 404 of 8th July 1961 on copyright, as amended on 23d August 1971.	(2 3)	25 years.
German Democratic Republic	Copyright Act of 1965	(2 3)	10 years.
German Federal Republic [4]	Copyright Act of 1965, as amended on 19th November 1972.	(2 3)	25 years.
Hungary	Copyright Act No. 111 of 1969	(2 3)	
Iceland [4]	Copyright Act of 1972	(2 3)	Do.
Iraq	Law of 21st January 1971 on the protection of copyright.	(2)	
Ireland [4]	Performers' Protection Act of 1968	(2)	
Italy [4]	Law No. 633 of 12th April 1941 on copyright, as amended on 23d August 1946.	(1)	25 years.
Japan	Law No. 48 of 6th May 1970 on copyright	(2 3)	20 years.
Mexico	Copyright Law of 29th December 1956, as amended on 4th November 1963.	(1 2 3)	Do.
Niger	Rome convention	(2)	Do.
Norway [4]	Copyright Law of 12th May 1961	(2 3)	25 years.
Paraguay	Copyright Law No. 94 of July 1951	(1)	
Philippines	Decree No. 49 of 20th November 1972 on intellectual property.	(2)	20 years.
South Africa [4]	Performers' Protection Act of 1967	(2)	Do.
Sweden [4]	Law No. 729 of 30th December 1960 on copyright, as amended on 25th May 1973.	(2 3)	25 years.
Turkey [4]	Copyright Statute of 10th December 1955	(2)	
United Kingdom [4]	Performers' protection acts 1958–1972	(2)	
Uruguay	Law No. 9739 of 1937 on copyright, as amended on 25th February 1938.	(1)	

[1] Right to remuneration for recording, reproduction, transmission of a performance to the public.

[2] Rights against recording, reproduction, transmission or communication of a performance to the public without the performer's consent.

[3] Right to remuneration for the broadcast or public performance of sound recordings of the performance.

[4] The International Federation of Musicians has members in these countries and also in Belgium, France, Greece, Israel, Netherlands, Poland, Spain, Switzerland, Yugoslavia and Zaire.

CZECHOSLOVAKIA—LAW NO. 35 OF 25TH MARCH 1965 ON COPYRIGHT

Article 36

(2) Without the consent of performers, their performances may not be used for:

(a) Fixation of sounds or images or of both sounds and images (hereinafter called "fixation") made for the manufacture of copies intended for public sale, or for the making of films intended to be shown in public (hereinafter called "copies of fixation");

(b) Making copies of fixations intended for public sale or the use of fixations or their copies for a purpose different from that for which the consent has already been granted, unless these are cases provided for in Section 37(1);

(c) Sound and visual broadcasts;

(d) Projecting in public or disseminating by other means, if the performance is conveyed to a person different from the organization intended to use it.

(3) Performers shall be entitled to remuneration for the use of their performances.

DENMARK

Law No. 158 of the 31st May 1961 on copyright.

Article 45

The performance of a literary or artistic work by a performing artist may not without his consent:

(a) be recorded on gramophone records, sound tape, films or other devices by which it can be reproduced;

(b) be broadcast directly over radio or television;

(c) be communicated to the public by some other technical means to another group than that before which the artist is giving a direct performance.

Article 47

When gramophone records or other sound recordings within the period stated in section 46, are used in radio or television broadcasts or when they are played publicly for commercial purposes, both the producer of the recording and the performing artists whose performances are reproduced shall be entitled to remuneration. If two or more performers have taken part in a performance, their claim or remuneration may only be made jointly. The rights of the performers may only be claimed through the producer or through a joint organization for producers and performers, approved by the Minister of Education.

EL SALVADOR

Decree No. 876 of 6th September 1963 on copyright.

Article 57

The performers referred to in the preceding Article are entitled to receive financial remuneration for the exploitation of their performance diffused by means of broadcasting, television, cinematography, phonographic discs, or any other means for the reproduction of sounds or images.

Broadcasting or television organisations which record programmes may not subsequently exploit them without making the requisite payment to the performers.

FIJI

Performers Protection Ordinance No. 13 of 20th June 1966.

Criminal offence to record/reproduce or broadcast performances without the performer's consent; similarly the public performance of any record of the performance so made.

FINLAND

Law No. 404 of 8th July 1961 on copyright, as amended on 23rd August 1971.

Article 45

A performing artist's performance of a literary or artistic work may not without his consent be recorded on phonographic records, films, or other instruments by which it can be reproduced, and it may not without such consent be made available to the public, broadcast over radio or television or by direct communication.

Article 47

If a sound recording mentioned in article 46 is used before the end of the term therein provided in a radio or television broadcast, a compensation shall be paid both to the producer of the recording and to the performer whose performance is recorded. If two or more performers have participated in a performance, their right may only be claimed jointly.

GERMAN DEMOCRATIC REPUBLIC

Copyright Act of 1965.

Article 73

(1) The individual performance of an artist who, as a soloist, produces, or lends his support to, a public performance or public recitation may only be used with his consent:

(a) For a reproduction recording, if this is for the purpose of the manufacture of reproductions intended to be placed on sale, performed or broadcast in public;

(b) For broadcast by radio or television;

(c) In connection with the making of a film.

Article 80

As regards the utilisation of performances referred to in Articles 73 and 78, the owner of the right to the reproduction of such presentations is entitled to a remuneration. The nature and amount of such remuneration may be fixed by the Minister of Culture and, in so far as he is responsible, by the President of the State Broadcasting Committee, after consultation with the directors of the competent central State bodies and the interested social organisations.

GERMAN FEDERAL REPUBLIC

Copyright Act of 1965, as amended on 19th November 1972.

Article 74

A performance may be publicly communicated by screen, loudspeaker or similar technical devices outside the location where it takes place only with the consent of the performer.

Article 75

A performance may be fixed on visual or sound records only with the consent of the performer. The visual or sound records may be reproduced only with his consent.

Article 76

(1) A performance may be broadcast only with the consent of the performer.

(2) A performance which has been lawfully fixed on visual or sound records may be broadcast without the consent of the performer if such records have previously been published; however, in such circumstances the performer shall be paid an equitable remuneration.

Article 77

If a performance is publicly communicated by means of visual or sound records or if a broadcast performance is publicly communicated, the performer shall have the right to an equitable remuneration with respect thereto.

HUNGARY

Copyright Act No. 111 of 1969.

Article 49

(1) The consent of the performer—of the conductor and the principal participants (soloists) in case of ensembles—shall be required for:

(a) Recording the performance for purposes of putting the recording into circulation or of public performance, or

(b) Transmitting the performance, without recording it, to an audience not present.

* * * * * * *

(3) If the performers are professional performing artists, a remuneration shall be due in return for a recording made for purposes of putting it into circulation or of public performance and in return for transmission, unless otherwise agreed, and except in cases of free use.

ICELAND

Article 45

The following activities shall be prohibited without the consent of a performing artist.

(1) Sound recordings for the purpose of reproducing his direct artistic performance. That which a performing artist performs personally, including a broadcast performance. If a broadcasting organization has made a provisional recording of a personal artistic performance, then the broadcasting of such a recording shall be subject to the same rules as if it were a direct artistic performance;

(2) The broadcasting of a direct artistic performance;

(3) The distribution of a direct artistic performance by technical means, by wire or wireless, from the place of performance to other specified places accessible to the public;

(4) The copying of a recording of an artistic performance.

Article 47

When a sound recording, which has been published for commercial purposes, is used within the period stated in Article 46: (1) in radio broadcasts or (2) in other public dissemination of artistic performances for commercial purposes, whether by direct use or by radio, then the user shall be required to pay a composite remuneration both to the producer and to the performing artists.

IRAQ

Law of 21st January 1971 on the protection of copyright.

Article 5

Performers shall enjoy the protection granted by this Law.

IRELAND

Performers' Protection Act of 1968.

Criminal offense to record/reproduce, broadcast or communicate to the public the performance without the performer's consent; similarly the broadcasting or communication to the public of a record of the performance so made.

ITALY

Law No. 633 of 12th April 1941 on copyright, as amended on 23rd August 1946.

Article 80

Artists who act or interpret dramatic or literary works, as well as artists who perform musical works or compositions, even if such works or composition are in the public domain, shall, independently of any remuneration in respect of their acting, interpretation, or performance, have the right to equitable remuneration from any person who diffuses or transmits by broadcasting, telephony or like means, or who engraves, records, or reproduces in any manner upon a phonographic record, cinematographic film or other like contrivance, their acting, interpretation or performance.

This right shall not apply where the recitation or performance is given for the purpose of such broadcasting, telephony, cinematography, engraving or recording upon the mechanical contrivances indicated above, and remuneration is paid therefor.

JAPAN

Law No. 48 of 6th May 1970 on copyright.

Article 91

(1) Performers shall have the exclusive right to make sound or visual recordings of their performance.

Article 92

(1) Performers shall have the exclusive right to broadcast and diffuse by wire their performances.

Article 95

(1) When broadcasting organisations and those who engage in wire diffusion service principally for the purpose of offering music (hereinafter in this Article and Article 97, paragraph (1) referred to as "broadcasting organisations, etc") have broadcast or diffused by wire commercial phonograms incorporating performances with the authorization of the owner of the right mentioned in Article 91 paragraph (1) (except rebroadcast or diffusion by wire made upon receiving such broadcast), they shall pay secondary use fees to the performers whose

performances (in which neighbouring rights subsist) have been so broadcast or diffused by wire.

MEXICO

Copyright law of 29th December 1956, as amended on 4th November 1957.

Article 80

Recordings or discs used for public performance by means of joke boxes or similar apparatus, and for direct financial gain, shall give rise to royalties in favour of authors, interpreters or performers.

Article 84

Interpreters and performers who participate in any performance shall be entitled to receive financial remuneration for the exploitation on their interpretations.

Article 86

The express authorization of the interpreters or performers is necessary for any broadcast re-emission or fixation of a broadcast thereof, and any reproduction of any such fixation.

Article 87

Interpreters and performers have the right to oppose:

(I) The fixation upon a base material, the radio-diffusion, and any other form of communication to the public, of their direct acting and performances;

(II) The fixation upon a base material of their acting and performances which are broadcast or televised, and

(III) Any reproduction which differs in its purpose from that authorized by them.

NORWAY

Copyright Law of 12th May 1961.

Article 42

A performing artist's performance of a work may not without the consent of the artist be:

(a) recorded on gramophone records, film, recording tape or other instrument which can reproduce the work.

(b) broadcast directly from the performance, or

(c) in any other manner through simultaneous transfer by technical means made publicly available for another group of persons than that for which the artist performs.

PARAGUAY

Copyright Law No. 94 of July 1951

Article 87

Persons who perform viz., sing, declaim, play, etc., shall have intellectual rights under the same terms as authors.

Article 89

The performer of a literary or musical work or of a work susceptible of any other form of artistic expression, shall have the right to demand a remuneration for any of his performances which are broadcast or retransmitted by means of radio-telephony or television, or which are recorded upon discs, films, tapes, wires, or any other medium capable of being used for sound or visual reproduction.

PHILIPPINES

Decree No. 49 of 20th November, 1972 on intellectual property.

Article 92

Performers shall have the exclusive right:

(a) to record or authorize the recording of their performance to the public on any recording apparatus for image and/or sound.

(b) to authorize the broadcasting and the communication to the public of their performance.

SOUTH AFRICA

Performers' Protection Act of 1967.

Criminal offence to record/reproduce, broadcast or communicate to the public performances without the performer's consent.

SWEDEN

Law No. 729 of 30th December 1960 on copyright, as amended on 25th May 1973.

Article 45

A performing artist's performance of a literary or artistic work may not without his consent be recorded on phonographic records, films, or other instruments by which it can be reproduced, and it may not without such consent be broadcast over radio or television or made available to the public by direct communication.

Article 47

If a sound recording mentioned in Article 46 is used before the end of the term therein provided in a radio or television broadcast, a compensation shall be paid both to the producer of the recording and to the performer whose performance is recorded. If two or more performers have participated in a performance, their right may only be claimed jointly. As against a radio or television organisation, the performer's right shall be claimed through the producer.

TURKEY

Copyright Statute of 10th December 1955.

Article 81

If the recital or performance of a scientific, literary or musical work is recorded whether directly or indirectly (viz. when the diffusion of the recital or performance by radio or similar devices is recorded) on instruments for the reproduction of signs, sounds and images, said instruments may be reproduced or diffused only with the permission of the performing artist.

UNITED KINGDOM

Performers Protection Acts 1958–1972.

Criminal offence to record/reproduce, broadcast performances without the performer's consent; similarly the public performance of any record of a performance so made.

URUGUAY

Law No. 9739 of 1937 on copyright, as amended on 25th February 1938.

Article 7

Subject to the limitations hereinafter specified, the following shall be the owners of copyright:

* * * * * * *

(d) The performing artist of a literary or musical work in respect of his performance;

Article 36

The performer of a literary or musical work shall have the right to demand a remuneration for any of his performances which are broadcast or retransmitted by means of radio or television, or which are recorded or printed on a disc, film tape, wire, or any other medium capable of being used for sound or visual reproduction. If an agreement cannot be reached, the amount of the remuneration shall be established in a summary proceeding by the competent judicial authority.

Mr. Bikel. The people on the other side, just to conclude, are rather lonely and theirs would be a totally lonely voice were it not for the considerable political clout and economic muscle that they possess, but I would hate to think that a Committee of Congress is more impressed by power than by justice.

Thank you.

Mr. Kastenmeier. Thank you, Mr. Bikel, although many will observe that the AFL–CIO has considerable power.

Mr. Bikel. But not economic power.

[The prepared statement of Theodore Bikel follows:]

Statement of Theodore Bikel, President, Actors Equity Association

Mr. Chairman, I appear here today as President of the Actors' Equity Association and as an individual performing artist who has more than a passing acquaintance with the problems and goals of the American recording artist.

Actors Equity is the national union of some 19,000 professional actors, actresses and stage managers. Our primary concern is with the welfare of these very talented, creative people when they appear on the stage of the American theatre. Though many of them also make recordings, we do not directly represent them in their relationships with the recording industry or the broadcasters. That is the function of the American Federation of Television and Radio Artists, and the American Federation of Musicians, representatives of which organizations have appeared before this committee and its counterpart in the Senate many times over the past several years. And they are appearing before you again today.

I am here to support their appeal for incorporation into H.R. 2223 of the principles expressed in H.R. 5345.

Quite frankly, I am appalled that H.R. 2223 which is heralded as an effort to update our 1909 copyright code, ignores the impact of the recording on the performing or interpretive artist.

In 1909, at the time the present basic Code was debated and approved, the work of the performing artist—actors, singers, musicians—had not changed in its essentials for centuries. The performer could weave the magic of his unique talent as he wished, for whomever he wished. His art, because it could not, then, be reduced to a tangible form, could not be stolen, abused, distorted, or exploited by others. The writer needed a détente with the printing press but in 1909 the performer had not yet come to face his own mechanical nemesis.

But two inventions changed all that: the phonograph and the radio. Between 1909 and today new developments coming with increasing speed have made it possible to freeze the artists' works on all kinds of material and transmit these performances to millions of people at one and the same time. Because of these technical changes the performer's creation is no longer ephemeral; it has become something tangible and durable and it may be repeated exactly as originally rendered over and over again and even outlive the performer who originated it. The multiple effects on the performing artist's professional and material condition have been devastating.

To understand this, you must first understand that the rendering of a performance is a creative act—a work of art that is unique with each performer. It begins when one is born with talent to perceive and hear certain things; it continues through years of practicing and perfecting a technique by which these things can be communicated to others and it culminates in a performance—a performance which is so unique that it may never occur again even when attempted by the same performer or performers.

The broadcasters and others who profit from the work of performers will tell you this is not so—the performer is not a creator of anything, they say. I am amazed they have the gall to come before the Congress with such foolish sophistries. They are asking you to disbelieve your own ears. Can anyone, truly, render a song like Bert Lahr? Is there no distinction between my interpretation of a particular folk tune and Arlo Guthrie's or Harry Belafonte's performance of the same tune? What nonsense would they have you believe?

I think Erich Leinsdorf, former Music Director of the Boston Symphony knows a little about how music is created and he told the Senate committee in 1967:

"A musical composition—a musical score is not a jigsaw puzzle. In a jigsaw puzzle, the pieces go just so. There is only one way. No other possibilities. No interpretation. And when you have put the pieces where they fit you have a completed picture that will never change. You cannot say that one is better than the other.

"A musical score—the written-down score is a blueprint which is open to many ways of reading it. It is a blueprint which even if it is very strictly marked by the composer, still leaves a lot of room for both discretion and interpretation. . . .

"At the beginning of every year I tell my conducting students, when you are studying a score do not listen to a recording of the piece because what you hear

is not the composer; you hear the composer as presented to you by a strong performer or a strong personality. I tell them if you want to get to know the composer and make up your mind about how you feel about his work, you must only read his work. Only by reading will you know, because by listening you are not listening to the composer but to the composer plus.

"If the performer and the artists were not important, then one recording of Beethoven's Ninth would be sufficient for everyone for all time. Why bother with a second interpretation if it can be no different than the first? Or a third?

"No two performances are ever alike; you cannot make them alike even if you want to. Because the human blood is not made that way and the human heart isn't made that way. And the human temperament isn't made that way."

Less than a hundred years ago, actors like Edwin Booth, Ira Aldrich and James O'Neill, father of Eugene O'Neill, built entire careers on their performance of a particular play or the portrayal of a particular character which they spent years developing. Millions came to their touring performances. Others performed the same plays by the same authors but millions came to see only these particular performers. Why? Because what they did was unique, impossible to duplicate and preferable to the work of others. Today, however, such careers can be telescoped into a single recorded performance mechanically repeated time and time again and broadcast nationwide or even worldwide.

The radio broadcasters, the jukebox operators, the background music organizations piously inform you of their great public service to the arts and culture of America. "We", they say, "are the communicators of the performing arts and the popularizers of the individual artists. We do everyone great favors and, only incidentally, make a very nice profit for ourselves".

This is sheer nonsense, for the exact opposite is true. It is the recording artist who makes it possible for these corporations to function. It is the recording artist who provides their programming—the basic service they sell. It is the material prepared in a recording studio—not in a broadcast station—that people listen to. If there is a scale of measure who benefits most from the relationship between recording artists and these segments of the media, precious little weight would be found on their side, I assure you. Artistically, they contribute almost nothing that was not created by others and often initially paid for by others.

As you know, the broadcasters are now irate over the fact that cable television may use material prepared by the broadcast television producers without payment. I agree with them. This should not happen. But, I believe it is insulting to America's artists and audacious in the extreme for them to ask that you deny the very same principle to the recording artist that they wish you to uphold in their behalf against CATV.

The broadcasters and others who profit from the use of records speak of promoting a few solo artists but they never mention the problems of oversaturation faced by many other artists.

They do not speak of the growing number of radio stations today that do not even announce the music played, much less the artists performing, lest they take some time from the sponsor. They say nothing about the music piped into your office buildings, restaurants, beauty parlors, ball parks and bathrooms which is never identified and provides, not only no remuneration, but not even the benefit of publicity to the artists. Nor do they mention the growing potential for record buyers to tape directly off the air thus avoiding the necessity of purchasing a record for their own use or the use of their friends. What will happen to the argument that radio promotes the sale of records when this practice spreads? They do not speak of it.

And they never speak of the thousands upon thousands of job opportunities lost by innumerable, unknown but talented American singers and musicians because their recorded work or the recorded works of others displaced them from broadcast stations, cafes, restaurants and theatres. But this is a fact that cannot be denied and it has had very serious consequences for the cultural life of our country. One result has been the development of government programs on state, local and federal levels to employ musicians and singers; to replace, with government funds, the opportunities denied these artists because of technological innovation. I find this to be ironic. The Congress creates and supports programs for the arts and the artist but effectively prevents him from sharing in the huge profits being made by others on his work.

I am not opposed to technological change. I am pleased that, because of it, so many Americans and others can hear and enjoy the works of our very best talents, but, along with nearly every other artist in this land, I resent it when someone

else makes a profit—a very good profit—from my talent without so much as a token offer of remuneration to acknowledge the debt. I often hear talk in these halls of the impact of technological change on man and the necessity to develop methods by which government can insure that such change enhances human endeavor and does not stifle it. Well, here is a classic case. The recording, coupled with sophisticated transmission methods, makes it possible for people and corporations unknown to me—people who never employed me and never pay me—to take my art and turn it to their own profit. Abraham Lincoln pointed out that every worker is worthy of his hire. If the performer is hired, via the recording, by the radio station or jukebox operator, isn't he worthy of some compensation? The station manager gets paid, the disc jockey gets paid, as does the cleaning person. Since the work of recording artists comprises the overwhelming preponderance of what the radio stations sell aren't the artists entitled to something?

Mr. Chairman, you and many of your colleagues have heard these comments and questions before—many times before—and I thank you for your patience in listening to them again.

I returned from Europe two days ago to be here not because I personally have something at stake. It happens that the records I make are not the staple of the average broadcaster or jukebox operator. I made this effort because I am privileged to represent thousands of very creative performing artists who are not famous, not wealthy, not even comfortably well off, who are waiting—after many years—for your answer to the questions and comments I have voiced today and others have voiced here and at earlier hearings.

H.R. 2223 faces up to the author's problem regarding the duplicating machine and even treats the broadcaster's problem regarding cable. Why, then, should it persist in ignoring the performing artist's problem vis-a-vis technological changes that were innovated long before cable and Xerox came upon the scene? The bill would limit the copying of the printed word but it perpetuates the practice of permitting the free copying of a performer's work over and over again for the profit of others.

This inconsistency is wrong and the reluctance of this Committee and the Congress to face up to it is wrong. You have been told this by many knowledgeable artists—individually and through their organizations. You have been told this by representatives of the arts councils of our several states and communities, you have been told this by the National Endowment for the Arts, created, as you know, to assist and guide our national government in its relationships with the arts, you have been told this by the Administration and the Register of Copyrights. To my knowledge, 31 nations of the world have legally acknowledged the right of a performer to share in the profit made from the use of his recorded work and, by implication and example, they, too, have told you this country's current practice is wrong. Only those who derive personal profit by preventing or postponing any change in the status quo say otherwise and—as I indicated earlier—even they contradict themselves on the basic principles involved.

I sincerely trust this committee will see and understand these discrepancies and inequities in H.R. 2223 which discriminate against the performing artist and that it will make the appropriate corrections suggested by H.R. 5345 and similar bills.

Mr. KASTENMEIER. I thank the panel. I should observe that while we have been proceeding on these issues, each separate issue is in the context of a very large omnibus revision bill. Where we can isolate an issue of this sort, as important as it is, we have tried to accommodate the issue to our own schedule of time in Congress. We happen to be in session at the moment, but by asking a panel, however distinguished, to share what is really 30 minutes on one side, knowing that our questions, all colloquies which follow, will take another 30 minutes or so and the other panel will have a similar 30 minutes and 30 minutes or more, so that more than two hours are probably involved, or a whole morning, in attention to an issue of this sort. That is why we get into time constraints which sometimes we are compelled to impose.

I have just a couple of questions. Maybe I can address this to Mr. Gortikov or Mr. Wolff or Mr. Kaiser.

When we deal with the copyright protection in terms of a composer, whether that is recorded or live, in terms of music, the composer is protected. He is entitled to a performance royalty as he well would be also for a recording.

There is a distinction here, however. While this refers primarily to recordings, musicians or artists performing live in a music hall in a single unrecorded performance receive something other than a royalty. He receives some sort of a fee for the performance, but it is not a royalty.

Could you treat this distinction for me?

Mr. KAISER. It goes right to the nub of the question, Mr. Congressman.

Mr. KASTENMEIER. I guess the—what the implication is that really your live performance is not a performance within a copyright—within the framework of copyright and presumably there is no need to bring in even at this moment——

Mr. KAISER. Obviously——

Mr. KASTENMEIER. Except in the context of recordings.

Mr. KAISER. If we never had the printing press, if we still had the old story teller, the maker of a novel going around telling his story and having a full life of full employment, there never would have been a copyright law. When musicians or artists appear at a live concert, they get their pay for appearing there. It is when they are not employed by others who have for eternity perpetuated the skill exhibited at the live concert that keeps the musician or vocalist at home while others are still playing and using his talents and getting paid for it, where he gets no pay for it, that I suggest is the quintessence of the whole copyright phenomenon.

There is no difference between the two. When a motion picture studio engages a composer for hire, he gets paid for the work he does. The copyright comes into effect or becomes meaningful only when that product is extensively reused without his presence and being paid for at that presence.

Mr. KASTENMEIER. When an artist, such as Frank Sinatra, does a record, of course, he is in a favorable negotiating position outside of the copyright protection suggested here. I assume that he negotiates not only the basis of a single performance fee such as many of the distinguished artists that have appeared here this morning that you introduced. It is rather something beyond that when he makes a record.

I think it would be well if you indicated that difference, too, to the committee so we are able to see what the market mechanism is with respect to artists in terms of the present protection.

Mr. WOLFF. Perhaps we take things as being so self-evident that we don't bring them out quite as well. It is true. Mr. Sinatra and other stars of that nature—Mr. Bikel—is capable because of, as you say, his negotiating position, to negotiate a royalty which he will be paid on the sales of the record by the person who employs or contracts with him to make that particular record.

It is seldom, however—and he receives a royalty and that royalty can range from 2 percent of 95 percent of sales less tremendous costs of recording, and I will go into that, to perhaps maybe 10 or 12 percent for Mr. Sinatra. I don't know. This is a matter of privacy and I am not privy to it.

However, the overwhelming majority of records produced do not return royalties—do not, and I underline not, return royalties to Mr. Sinatra or any other star, the reason for it being that the tremendous cost of producing a record and producing it in a way that a Mr. Sinatra would be proud to have his name and face on the album cover, the cost is so great and that cost is deducted from the gross prior to royalties being based upon the net.

Now, I said that very quickly. It, of course, is a rather complex formula that is used.

Mr. KAISER. May I——

Mr. KASTENMEIER. But in its sense what we are saying is that those artists of very substantial name and who can have a commanding negotiating position, they negotiate their own performance royalty.

Mr. WOLFF. That is correct.

Mr. KAISER. No, no.

Mr. WOLFF. Not performance royalty. No, no. Just on sales.

Mr. KASTENMEIER. I know, but it is an equivalent——

Mr. WOLFF. It is not an equivalent. It is nowhere near an equivalent.

Mr. KAISER. Mr. Congressman, may I say that one of the effects of the recording phenomenon is to put the artist in a posture where he has nobody to negotiate with except his immediate employer. The musicians union had one of its largest sources of work and compensation in the radio industry. We have no members playing for radio for all practical purposes today. We have nobody to negotiate with. And indeed, because of the political clout so importantly mentioned by Mr. Bikel, we are now in the fantastic posture of being denied by the Congress of the United States under criminal sanctions the right by any means—that is the language the statute has—to protest the failure and refusal of any radio station to engage a live musician.

Now, we have nobody to negotiate with. When we negotiate with our employers in the recording industry, we can only negotiate with respect to their profits, to what they sell. They have no power to tell the broadcaster not to use our product. The broadcaster is free of any union pressures and any Sinatra pressures or anybody else's pressures. The broadcaster enjoys an immunity by virtue of the laws enacted by the Congress of the United States that can only be described as obscene.

Now, that is the fact. And it is an incontrovertible fact. And I have heard many times this canard that Mr. Wolff referred to——

Mr. KASTENMEIER. What——

Mr. KAISER [continuing]. That they make money when they sell records. The broadcaster is not selling that record. The record is. The record company loses a lot of money on some of these records.

Mr. KASTENMEIER. What law are you referring to?

Mr. KAISER. I am referring to the Lea Act known as the anti-Petrillo Act, and let me tell you about this broadcasting industry. It is a matter of record; $1 million they accumulated way back there in the forties, $1 million appropriated by the broadcasting industry to go out and ruin the name of James C. Petrillo because way back then he recognized the fearsome, the frightening impact of the unbridled use of recorded talents on the employment opportunities of creative artists. They went out——

Mr. KASTENMEIER. The reason I asked you that was to determine whether the Lea Act was a copyright law or some other——

Mr. KAISER. No. It is an amendment to the Federal Communications Act.

Mr. KASTENMEIER. FCC.

Mr. KAISER. Which makes it a crime to take any measures, even peaceful picketing, even advertising, to protest the rampant firing. We had staffs all over this country. We had men engaged full-time playing in almost every community of any size in this country, wiped out, Mr. Congressman and members of this committee. We hardly have a single person who derives a steady income from radio business today.

Mr. KASTENMEIER. I am informed my time has expired. I yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Yes. May I ask how the schedule was prepared that appeared in the bill H.R. 5345, as far as payments. I am just curious. How was the fee schedule determined?

Mr. GORTIKOV. Originally in section 114 when the principal performance right was encompassed within the general copyright bill. It is really arbitrarily arrived at to try to give heed to insulating the tiny station from any cost impact and to have some graduated measure of application and without penalizing the radio industry with any inordinate kind of costs. So, therefore, its net effect is less than—it is about a fourth of what they currently pay composers and publishers.

Mr. RAILSBACK. How would that money be distributed or allocated. For example, you have an orchestra and you also have a performing artist. Does this money go into a pool and then is it given to each artist and the primary performer?

Mr. WOLFF. If I may, Mr. Railsback, the only definite agreements or the only definite plans are these. One, as you probably know, the moneys would be divided between the artists concerned and the record companies. That is No. 1.

Mr. RAILSBACK. On what basis?

Mr. WOLFF. Fifty-fifty. So there would be two funds, one for the production company, the people who make the records, and one for the performing artists. If on—and I believe, sir, I said this in my presentation, but I don't think you were present——

Mr. RAILSBACK. I was late, yes, and I apologize.

Mr. WOLFF. Let me just give you an example. A performing artist, and I think there I used Mr. Sinatra's name again, makes a record which is played on radio, as it would be, and there are 10 musicians and 5 singers singing in the background with Mr. Sinatra. The royalty would be split 16 ways amongst those 16 performing artists that appear, that contribute to that phonograph record.

Mr. RAILSBACK. Is that set forth in the bill or is that——

Mr. WOLFF. No, sir.

Mr. RAILSBACK. Or is this all by agreement?

Mr. WOLFF. No, sir. The bill merely says the moneys will be made available. The royalties will be paid.

Mr. RAILSBACK. Does it say to whom it will be paid, because I haven't had a chance to really study it.

Mr. WOLFF. Oh, yes. I think it makes clear it will be paid to the performing artists, and to the production company.

Mr. RAILSBACK. I mean, is it set forth that it goes into a fund or to a certain designated agency or fund or what?

Mr. WOLFF. Go ahead.

Mr. Gortikov. There is an absence of detail in H.R. 5345. In the original section 114 it was set up that the Register of Copyrights would receive these moneys and there would be developed an equitable system for distributing it and for adjusting disputes. There is a great deal of work to be done to implementing the payout. It is most likely that since we—we already have a great deal of precedents, machinery that exists through the ASCAP, BMI mode of collecting and sharing these moneys. So, undoubtedly when it came to the point of working out the system, we would rely heavily on those precedents because they are working well to create equitable distributions among the proper recipients.

Mr. Railsback. I don't have much time, but may I give you a hypothetical and you can respond. Suppose you have a company that is within the range of, as advertising sponsors, more than $25,000 but less than $100,000, and that company plays a number of records, everything from rock to concertos. But they have to pay a $250 fee which goes into a fund. Who, then, is responsible for making the determination as to which artists are entitled to what benefits?

Mr. Gortikov. If we follow the ASCAP–BMI precedents, there is an intricate system of statistical monitoring of actual play lists of radio stations and airplay that ultimately comes up with formulas for distribution predicated on the reality of the air play that prevails.

Mr. Railsback. I see.

Mr. Wolff. Mr. Congressman, I think your question—I understood your question to go a little farther, as to who would be the performing artists that participated. Is that correct?

Mr. Railsback. Well, I think that has been answered—I think everybody that produces records.

Mr. Wolff. And we have data that shows us who was on particular records. We know who the performing artists are. That is not difficult. The performing unions know that.

Mr. Drinan [now presiding]. The time of the gentleman has expired.

Mr. Wolff, I would assume that logically the case would extend to a library collection of records and that as one European country does, at least, every author over there of a volume, of a book, gets a royalty every time the book is borrowed from the public library. Logically, I suppose your case would extend to the New York City Public Library if it loans the records.

Mr. Wolff. No, sir. We are talking here about the broadcast of the record.

Mr. Kaiser. Profitability, public performance.

Mr. Drinan. What I am trying to get at—I am trying to get at the philosophy of the exact plight of the artist or of the person. Now, if BMI or ASCAP took a position on this, could they secure the extra 1 percent and distribute it equitably?

Mr. Wolff. It might work very well.

Mr. Drinan. Why don't ASCAP and BMI carry the ball?

Mr. Wolff. Because they don't represent our people. I do—The American Federation of Television and Radio Artists and the American Federation of Musicians.

Mr. Drinan. I recognize that, but all I say is we have inherited this bill that came here from the Senate after like 8 or 9 years and we

are trying to get out a bill and I am just trying to find out where somebody dropped the ball. I don't believe, frankly, it was political clout and economic power that did it. It has been a rational distinction made along the line, and just for the sake of myself and the other members here, what is the legislative history? Did this ever have a chance of getting into the bill? Tell us the background.

Mr. WOLFF. Yes, sir. I think Mr. Kaiser, having been present through almost the 40 years of its evolution——

Mr. DRINAN. We have heard that, but why was it dropped?

Mr. KAISER. We were before this committee and we made an urgent request to have it incorporated in the basic revision bill and we—Mr. Wolff recited the result. The committee felt along with the then Register of Copyrights that there was still some—there were still some issues that were not sufficiently crystalized, and so this committee said, while we made very persuasive and cogent arguments——

Mr. DRINAN. I read that, sir.

Mr. KAISER. And it was you——

Mr. DRINAN. Would you answer the question?

Mr. KAISER. I am answering your question, sir. We came to you. The ball, if I may say so, was dropped by you.

Mr. DRINAN. I wasn't even——

Mr. KAISER. I don't mean you personally.

Mr. DRINAN. I wasn't even in Congress.

Mr. KAISER. I mean by Congress, by the House. The ball was dropped by you. We then went to the Senate. They found the same persuasiveness in our reasoning. At least the Senate committee did. And they adopted it. That is why we are here now. We are back to you. You told us to come back to another Congress. That was 6, 7 years ago. Now we are back.

Mr. GOLODNER. Mr. Drinan, if I can, sir, Mr. Kaiser is correct. The Senate Judiciary Committee did approve section 114 and in rather strong language endorsed it. When it came to the floor, there was a jurisdictional——

Mr. RAILSBACK. Would you yield? I think it was a tie vote, wasn't it? It was very close in this committee.

Mr. GOLODNER. There were some tie votes in the committee.

Mr. RAILSBACK. You left out part of the scenario.

Mr. DRINAN. That is precisely what I want to know.

Mr. GOLODNER. When it came to the floor, the Commerce Committee claimed jurisdiction and in a Commerce Committee report recommended against adoption because of the fact that the Commerce Committee did not have an opportunity to extensively study the matter. Senator Baker at that time voted with the majority of the Commerce Committee on this, but stated that,

"when it deleted section 114, insofar as it pertained to broadcasting, an amended related sections, the Committee did not pass—

He is talking about the Commerce Committee—

did not pass on the merits of the matter. Rather it was concerned that the short referral time made hearings impossible and precluded an in-depth consideration of the possible consequences.

This was after years of study by the Judiciary Committee and at the last minute, at the 23d hour, the Commerce Committee said it

didn't have a chance to study it and this is the reason it is not in the Senate bill today, because it was taken out. As I indicated, many Senators, including Senator Baker, agreed to take it out, not only on the substantive question, but on the procedural question.

Mr. DRINAN. Has the Commerce Committee done anything about it since?

Mr. GOLODNER. No.

Mr. DRINAN. Have you people been back to them?

Mr. GOLODNER. Yes, sir.

Mr. DRINAN. Just tell——

Mr. GOLODNER. We have asked for a hearing.

Mr. DRINAN. And what——

Mr. GOLODNER. We are having a hearing tomorrow again in the Judiciary Committee and in the Commerce Committee as far as we have been told the AFL–CIO—we will wait and see again what happens, what you people do, and what the Judiciary Committee does, and then it will decide what it will do.

Now, this has been going on unfortunately for years, years and years, and nobody yet has addressed this substantive question except insofar as your own committee did in 1966 in which it admitted or not admitted but stated, rather, that there were no persuasive arguments opposed to what we are saying, yet at that time it was premature and that was 8 years ago.

Mr. DRINAN. Well, Mr. Kastenmeier, our distinguished chairman, is the only survivor of that particular committee, so you will have to educate us all over again.

Mr. KAISER. That ought to be a lesson to you.

[Laughter.]

Mr. DRINAN. All right, Mr. Chairman, my time has expired.

Mr. KASTENMEIER [now presiding]. Thank you. I don't know what lesson—I yield to the gentleman from New York, Mr. Pattison.

Mr. PATTISON. I thank the panel for being here with us today, particularly my old friend John Hightower, whose career in the promotion of American cultural interests is well-known, at least to me, and Mr. Bikel, whom I have heard on a number of occasions at various folk festivals, and can attest to the truth that each performance is a separate, unique creative thing. And I thank him for being here and for his art.

Mr. DRINAN. Should he be compensated for every single one?

Mr. PATTISON. Not the folk festival.

I am interested in the question that was raised by the gentleman from Massachusetts and perhaps Mr. Gortikov could respond to that. Is it not true that an ASCAP kind of organization will have to be set up and that the reason that ASCAP, BMI, et cetera, cannot do that is for antitrust reasons? Would it not violate the consent decree, or maybe that is not the problem.

Mr. GORTIKOV. I can't speak to a possible violation of consent decree. We have counsel here, if you are interested in that aspect.

But, certainly, in response to the forward part of your question, some entity for collection would have to be set up, if it were——

Mr. PATTISON. For distribution.

Mr. GORTIKOV [continuing]. For the collection and distribution of the royalties. If there were no legal prohibitions, perhaps ASCAP or

BMI might be interested in being that collection entity merely because they are doing processes and have procedures and mechanics for doing it. We haven't approached it, because it would be premature.

Mr. PATTISON. No point in setting up such a mechanism until the fund is available.

Mr. GORTIKOV. Correct.

Mr. PATTISON. All right. Do any of you have a proposal of thoughts about the permanence of the fee? You know, there are proposals for various other parts of the bill, for a tribunal, and for setting the fee by tribunal with a reference back to the Congress. Is that part of your proposal?

Mr. GORTIKOV. The language of this bill says that this fee shall prevail for no less than 2 years. It sets—it puts the onus, the responsibility on the parties to negotiate any change, if there is to be any change. And if the parties fail to agree, there is an arbitration machinery set up within this bill to accomplish this. It is quite parallel to the prevailing mechanism under which ASCAP, under which the publishers and composers set their amounts, although it isn't precisely the fact.

Mr. PATTISON. Except this is a compulsory license.

Mr. GORTIKOV. Correct.

Mr. PATTISON. And the ASCAP is not.

Mr. GORTIKOV. Correct.

Mr. PATTISON. Would the industry—would the performers be satisfied with a bill that did not contain that kind of fee for setting or fee changing mechanism, or leave it to the Congress, from time to time, to relook at that?

Mr. GORTIKOV. I can't speak for the performers. I could speak for the companies and I could say that we are primarily interested in the right, if the rate can be improved on or reviewed and could be the subject of negotiations with the parties, we would be more than happy if that is the wish of Congress to approach it that way.

Mr. WOLFF. If I may chime in, we have unanimous approval from the performing unions that if this is the kind of legislation that is deemed proper, that we would be in agreement that Congress can, from time to time, make the changes and that be the mechanism as far as changes in rates up or down are concerned.

Mr. PATTISON. Particularly in view of the fact that it is based on a percentage.

Mr. WOLFF. That is correct.

Mr. PATTISON. Which gets redirected.

Mr. WOLFF. Right.

Mr. PATTISON. I have no further questions.

Mr. KASTENMEIER. I have just one or two questions.

I take it that while we are principally talking about music, 99 percent of what is performed, the records, will be music, it isn't limited to music. A dramatic reading by Mr. Bikel or a recording would be covered.

Mr. WOLFF. We would hope it would be included and it is in the bill. I know it is in the bill, but I would hope that nobody would consider the rights of a singer to be more important than the rights of a performing actor or actress.

Mr. HIGHTOWER. Also, Mr. Chairman, if I might add one thought, also the dancers would be covered, should the development of the

hardware for recorded film that you can attach to your television set, that it would also cover a performance royalty for a dancer in visual performance.

Mr. KASTENMEIER. Well, the language in the bill says reproduction of a copyrighted work which is a sound recording. That being the case, I wonder whether it would in fact, include visual reproductions?

Mr. BIKEL. That is not specifically under the bill, but if the new audiovisual techniques can be developed, a future one can refer to this bill as a model for inclusion of the other. But, the bill itself envisions only sound recordings.

Mr. KASTENMEIER. I have only one other question and I ask this for the purpose of developing some sort of historical understanding of what can happen. It was pointed out that, and I will address this to Mr. Gortikov, that 10 years ago, more or less, the recording industry of America opposed performance rights for artists of this character, but now does not. What has happened, candidly speaking, what has happened in those years whereby you are able to be in agreement with the artists who seek this coverage?

Mr. GORTIKOV. May I defer to counsel on this, because I was not affiliated with the association at that time, and I would not want to be—Mr. James Fitzpatrick of Arnold and Porter, general counsel for the association.

Mr. FITZPATRICK. If I could speak to that, in 1965, the RIAA presentation was directed to section 115, which was the mechanical royalty provision. The association took no position affirmatively or negatively, it is my recollection, on the performance royalty provision. However, individual companies within the Recording Industry Association very aggressively and assertively supported the performance royalty provision. In the next—over the course of the next 2 years, the Recording Industry Association and the unions worked together for the first time in the whole history of this provision and came out with a package that both the recording industry and the unions fully supported from front to back, and that became the subject of an amendment on the Senate side that was incorporated in the Senate bill and stayed in the Senate bill as Mr. Golodner had indicated, until it got to the floor late last fall.

So, it was more a matter of evolution within the recording industry rather than a matter of an alteration or reversal of position.

Mr. GOLODNER. Mr. Chairman, if I may, I don't want to interrupt this line of questioning, but it occurs to me I would like to go back to a question you asked earlier about the cost of the production of a recording and the artists' share in some of those costs, because it occurs to me now we are talking about the unions and the recording industry, but the AFL–CIO statement also addresses itself to the consumer, who would benefit if this right was established.

Right now, the entire cost of the recording industry is borne on the backs of the average record purchaser, the average citizen who goes into a store and buys a record, and yet there is this broadcasting industry, the jukebox industry, background music people, who are exploiting these records for profit and they are disproportionately sharing quite a bit less than you and I, who have to support all of this, and the AFL–CIO statement does include it and it just occurred to me we are talking about in terms of the artists, in terms of the industry,

but we have another interest here. As you know, most of our members are not artists. They are consumers, and I just wanted to make that point.

Mr. KASTENMEIER. Well, on behalf of the committee, we thank you gentlemen for your presentation here this morning.

Now I would like to call Mr. Vincent Wasilewski, President of the National Association of Broadcasters, and also as a member of the panel, Mr. Harold Krelstein, chairman, Radio Board of Directors, also the National Association of Broadcasters, and Wayne Cornils, chairman, Small Market Radio Committee of the National Association of Broadcasters.

Mr. Wasilewski is accompanied by Mr. John Dimling.

We have allocated 15 minutes to Mr. Wasilewski, 7½ minutes each to Mr. Krelstein and Mr. Cornils for their presentations. Welcome, gentlemen.

I will call on you, Mr. Wasilewski.

[The prepared statements of Mr. Wasilewski and Mr. Cornils follow:]

STATEMENT BY VINCENT T. WASILEWSKI, PRESIDENT OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Mr. Chairman, my name is Vincent T. Wasilewski. I am President of the National Association of Broadcasters, which is located at 1771 N Street, N.W. Washington, D.C. The NAB is a non-profit trade association, which has a membership of 4,079 AM and FM radio stations, 540 television stations and all national radio and television networks.

Mr. Chairman, broadcasters regard themselves as partners in the business of bringing to America her citizens' artistic efforts in making phonograph records. We appear before you today as a partner who has unwittingly and we think unwisely and unjustifiably been forced to defend itself against a copyright scheme which has no place in the copyright law of the United States. And we are asked to defend ourselves against the payment of a fee which flies directly in the face of trade practices, economic realities and the Constitution of the United States.

The so-called "Performance Rights Amendment" would require, for the first time, that radio and television stations pay royalties to performing artists and record companies for the air play of their records. Record companies and recording artists argue that this assessment is justified by the fact that a record is the creative work of both the record company and the recording artist, that radio stations are able to use this work without compensating the artists, and that the "promotion of the useful arts and sciences" suffers thereby.

As the primary vehicle for the dissemination of the sounds on sound recordings, we are not here to denigrate the artistry of the recording industry. Anyone who has heard the Beatles singing on "Sgt. Pepper's Lonely Hearts Club Band" or Julie London singing the "Mickey Mouse Club Song" to a Congressional committee knows full well just how talented and creative the music industry can be. But talent and creativity do not a copyright make. And it is copyright that we are here to discuss.

A copyright is a governmentally-sanctioned monopoly. In a nation which traditionally abhors monopoly there must be some overriding reason to confer monopoly status on any endeavor. In the case of copyright, that overriding reason is provided by the desire to encourage creativity and once having encouraged it, to protect and nurture it. When we enact a copyright statute, one eye must therefore remain steadfastly on one question—is this copyright this constitutionally mandated, yet radical, departure from the norm of national policy—necessary to foster and protect creativity?

We believe that the "Performance Rights Amendment of 1975" fails to meet the rigid test necessary to confer full copyright status upon any class of creative endeavor. We do so in a manner which we believe is not unmindful of the unique qualities of the recording industry. Indeed, we recognize that in our continuing support for the protection of sound recordings from unauthorized piracy.

But we are also convinced that creativity in the recording industry is not solely the province of the record company and the record artist. There is a third partner in that process—another participant whose efforts are primarily responsible for huge increases in record sales and audiences at recording artists' concerts—the radio industry. And the radio industry believes that it, too, serves the creative process, that it ensures broad exposure for creative works, that via the air play of records, it encourages and promotes the sale of original artistry, that it provides the compensatory spur to additional creative efforts by record companies and recording artists. For all of that, we seek no compensation from the recording companies, we ask for no promotional fee. We seek merely the continuation of a copyright law and an economic marketplace which has satisfied the spirit of the copyright provision of the Constitution.

The statutory grant of a copyright confers upon its recipient two fundamental rights—the right to protect the integrity of his creation from unauthorized use and the right to demand compensation by one who seeks authorization to use it. And those rights are granted for one purpose alone.

Article I, Section 8 of the Constitution provides that the Congress shall have the power "to promote the progress of science and the useful arts by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries." The Constitution does not mandate copyright—it confers power upon the Congress to provide it. Indeed, in the construction of the language of the provision, the framers' intent is clear—it is not the paramount interest to secure "exclusive rights"—it is the goal of promoting the "progress of science and the useful arts" which is preeminent.

Mr. Chairman, the NAB believes that the "promotion of the useful arts and sciences" demanded a limited copyright for the purpose of preventing the unauthorized piracy of sound recordings. When such legislation was before the 93rd Congress we wrote every member of Congress indicating our support for the proposal. We felt then, as we do now, that the Copyright Law should not allow record pirates to steal the creative endeavors of the record industry. In passing that legislation, the Congress satisfied the artist's right to the protection of the integrity of his creation.

Having done that, however, Congress is now asked to give record companies and recording artists copyright compensation for the use of records by radio stations. We think it is unnecessary and unfair. We believe that they are compensated already, albeit indirectly, and that any additional assessment would represent an unfair burden on the broadcast industry and a windfall for the record industry.

Broadcasters currently pay copyright fees. Radio and television stations pay approximately 3.5% of their net advertising receipts to the publishers, lyricists and composers of musical works. We are asked now to pay an additional one percent, subject to periodic review, for the play of records on radio and TV. And we are asked to pay that one percent to an industry that is growing faster than the industry which fuels its growth.

Mr. Chairman, in the controversy of the "Performance Rights Amendment" there is no disagreement between the proponents and opponents on the fact that indirect compensation does flow to recording interests and record companies. The form of that compensation is the promotional benefit reaped by the artists and companies for air play of their work. And the amount of the compensation is staggering. Mr. Chairman, the evidence that there is no disagreement on the value of air play to the record industry comes not from the broadcasting industry but from the record companies themselves. Listen, for a moment, to their words—to the words of Stan Cornyn of Warner Brothers Records:

"What would happen to our business if radio died? If it weren't for radio, half of us in the record business would have to give up our Mercedes leases . . . we at Warners won't even put an album out unless it will get airplay." [1]

Listen to the words of Bobby Colomby, the drummer of the rock group, "Blood, Sweat and Tears" (in answer to the question, How important is radio to you?):

"Well, that is *it* . . . what you're doing is . . . you're advertising." (Emphasis added) [2]

That the revenue does flow to performing artists and record companies is self-evident. The amount of such revenue is not. A closer look reveals that additional revenues are not only unnecessary but unwarranted as well.

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[1] Daily Variety, Mar. 4, 1975.
[2] Radio Program "The Politics of Pop", June 5, 1975.

There are several distinct groups of people who are involved in bringing about recorded music: the composer of the music, the publisher, the artist who records the music, and the record company that produces and distributes the record. Revenue comes from two sources—record sales and air play of the record. NAB retained Dr. Frederic Stuart of Hofstra University to estimate the relative amounts of money each of the four parties realized from the sale and air play of recorded music; the results of his research are enlightening and somewhat surprising.

Under present arrangements, all four parties—that is, composers, publishers, artists and record companies—receive money from the sale of records, but only composers and publishers receive payment for broadcast performances (air play of records). Dr. Stuart estimated the revenues generated by a random sample of records; he found that the income was distributed as follows:

Composers	$2,570,000
Publishers	2,910,000
Performing artists	2,860,000
Record companies (after variable manufacturing costs)	10,720,000

But these figures don't reflect two important factors: (1) the artists and recording companies must bear the cost of unsuccessful records (so that the amounts of money they receive should be reduced to take this into account); and (2) in many cases the performing artists are also the composer and/or publisher of the songs they record, so they also receive royalties from air play of the records.

Refining his figures to take these factors into account, Dr. Stuart found that the distribution of money from this same sample of records looked like this:

Composers	$1,530,000
Publishers	1,200,000
Performing artists	4,200,000
Record companies	10,000,000

He concluded: "The foregoing analysis shows the performing artist to be . . . well ahead of . . . composers and publishers in the distribution of income generated by the broadcasts and sales of records, but rather far behind the record companies, and none of these figures takes into account the substantial revenues generated by live concerts."

Mr. Chairman, I submit that the "Performance Rights Amendment" does not belong in this copyright bill. It is recommended neither by the constitutional guidelines nor the economic marketplace. It fails to "promote the progress of science," it imposes an unreasonable burden on a symbiotic partner in the music industry, and promises windfall profits for those for whom no need can be demonstrated. For all of these reasons, we ask that you reject it.

Statement by Wayne C. Cornils, President and General Manager, KFXD and KFXD/FM, Nampa, Idaho

Mr. Chairman, my name is Wayne C. Cornils. I own approximately 20% of the Idaho Broadcasting Company and serve as president and general manager of KFXD/AM and KFXD/FM, Nampa, Idaho.

I am also privileged to serve as Chairman of the Small Market Radio Committee of the National Association of Broadcasters. The other members of the Small Market Radio Committee operate broadcast properties in Deming, New Mexico; Indianola, Mississippi; Valdese, North Carolina; Brattleboro, Vermont; and Mankato, Minnesota. The Small Market Radio Committee represents radio broadcasters in markets of 100,000 population or less.

The small market broadcaster is a person totally involved with, completely dedicated to and an integral part of the community he serves.

Much of what is defined as entertainment programming on a small market radio station is provided in the playing of recorded music.

In addition to the numerous other expenses of operation, the small market broadcaster is required to pay monthly fees to several music licensing organizations, including BMI, ASCAP and SESAC. The monies thus paid are distributed by these organizations to the composers, lyricists and publishers.

Now, Mr. Chairman, we are faced with the so-called "performance rights amendment," which would require us, for the first time, to pay royalties to performing artists and record companies.

There can be no doubt in anyone's mind that the exposure given to recorded music by the broadcast industry encourages and promotes the sale of records. In turn, the sale of records obviously encourages and promotes additional creative efforts by record companies and recording artists. Mr. Chairman, radio sells records.

In Boise, Idaho, a community of approximately 90,000 and the adjacent city of Nampa, a community of approximately 20,000, there are 26 outlets where records may be purchased. All of these retailers would agree that exposure on radio provides the primary impetus for the purchase of records.

Last week, I spoke with Mr. Nelson Taylor, who is the manager of the Super Thrift Drug Stores in Nampa. Mr. Taylor told me, "If it were not for record exposure on radio, I would not have a record department."

And Bob Gordon, manager of the record departments of the Bon Marche Department Stores, told me that he has removed his record audition booths because the customers have already heard the records on radio.

And Gary Pratt, the owner of Gary's Stereo, sells 8-track tapes and cassette recordings, a business by the way, which has developed as an outgrowth of the record industry. At Mr. Pratt's request, each week I send him the KFXD–AM playlist. Mr. Pratt orders his tapes and cassettes directly from that list.

So, there can be no doubt in the minds of the managers in the 26 record outlets in the Nampa-Boise area about the important role played by radio in the sale of records. Radio sells records.

Attesting to the recording artists' popularity due to radio exposure are the large fees which these artists are able to command for personal appearances. I have a colleague in Omaha who tells me that 15–20 recording artists or groups appear in that city during the course of a year. In Omaha, the minimum fee for a single appearance is approximately $5,000—this for artists such as Jim Stafford, the Righteous Brothers and Dr. John. Others, like Alice Cooper and John Denver, receive $20–30,000, while some, like Elvis Presley, receive $100,000.

In Nampa/Boise the figures are very similar: $15,000 for the Carpenters; $25,000 for the Beach Boys; $18,000 for Chicago; and for Elton John, a rather staggering 80% of the gross, against a guarantee of $30,000. These fees are for a single performance or what is called "a one-night stand."

Radio not only sells records, but provides the audiences for recording artists.

In conclusion, Mr. Chairman, composers, publishers and lyricists receive compensation in the form of monies paid by broadcast stations to the music licensing organizations. The record companies, artists and composers receive monies from the sale of records—sales which are promoted by the exposure of their product on radio. In addition, the artist receives huge sums of money for personal appearances. As we have pointed out, the fees for personal appearances are determined by the artist's popularity and the artist's popularity is determined, to a large degree, by the exposure received on radio.

Mr. Chairman, to charge broadcasters an additional fee is unnecessary, unfair and unjust. It would place an extremely heavy burden on all broadcasters, certainly including those of us in America's smaller markets.

Thank you.

TESTIMONY OF VINCENT T. WASILEWSKI, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS, ACCOMPANIED BY HAROLD KRELSTEIN, CHAIRMAN, RADIO BOARD OF DIRECTORS, NATIONAL ASSOCIATION OF BROADCASTERS; WAYNE CORNILS, CHAIRMAN, SMALL MARKET RADIO COMMITTEE, NATIONAL ASSOCIATION OF BROADCASTERS; AND THOMAS H. WALL, ATTORNEY

Mr. Wasilewski. Thank you, Mr. Chairman. My name is Vincent Wasilewski.

I am president of the National Association of Broadcasters, which is located at 1771 N Street NW., Washington, D.C. The NAB is a nonprofit trade association, which has a membership of 4,079 AM and FM radio stations, 540 television stations and all national radio and television networks.

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Having done that, however, Congress is now asked to give record companies and recording artists copyright compensation for the use of records by radio stations. We think it is unnecessary and unfair. We believe that they are compensated already, albeit indirectly, and that any additional assessment would represent an unfair burden on the broadcast industry and a windfall for the record industry.

Broadcasters currently pay copyright fees. Radio and television stations pay approximately 3.5 percent of their net advertising receipts to the publishers, lyricists, and composers of musical works. We are asked now to pay an additional 1 percent, subject to periodic review, for the play of records on radio and TV. And we are asked to pay that 1 percent to an industry that is growing faster than the industry that fuels its growth.

Mr. Chairman, in the controversy of the "Performance Rights Amendment," there is no disagreement between the proponents and the opponents on the fact that indirect compensation does flow to recording artists and record companies. The form of that compensation is the promotional benefit reaped by the artists and companies for airplay of their work. And the amount of the compensation is staggering. Mr. Chairman, the evidence that there is no disagreement on the value of airplay to the record industry comes not from the broadcasting industry but from the record companies themselves. Listen, for a moment, to their words—to the words of Stan Cornyn of Warner Bros. Records:

> What would happen to our business if radio died? If it weren't for radio, half of us in the record business would have to give up our Mercedes leases—we at Warners won't even put an album out unless it will get airplay.[1]

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[1] Daily Variety, Mar. 4, 1975.

Listen to the words of Bobby Colomby, the drummer of the rock group "Blood, Sweat and Tears," in answer to the question, how important is radio to you? "Well, that is it—what you're doing is—you're advertising." [1]

That the revenue does flow to performing artists and record companies is self-evident. The amount of such revenue is not. A closer look reveals that additional revenues are not only unnecessary but unwarranted as well.

There are several distinct groups of people who are involved in bringing about recorded music. There is the composer of the music, there is the publisher, there is the artist who records the music, and there is the record company that produces and distributes the record. Revenue comes from two sources—record sales and airplay of the record. NAB retained Dr. Frederic Stuart of Hofstra University to estimate the relative amounts of money each of the four parties realized from the sale and airplay of recorded music; the results of his research are enlightening and, I think, somewhat surprising.

Under present arrangements, all four parties—namely, composers, publishers, artists, and record companies—receive money from the sale of records, but only composers and publishers receive payment for broadcast performances, that is, airplay of records. Dr. Stuart estimated the revenues generated by a random sample of records; he found that the income was distributed as follows: To the composers, $2,570,000; to the publishers, $2,910,000; to the performing artists, $2,860,000; and to the record companies, after variable manufacturing costs, $10,720,000.

But these figures don't reflect two important factors: (1) The artists and recording companies must bear the cost of unsuccessful records, so the amounts of money they receive should be reduced to take this into account; and (2) in many cases, the performing artists are also the composer and/or publisher of the songs they record, so that they also receive royalties from airplay of the records.

Refining his figures to take these factors into account, Dr. Stuart found that the distribution of money from this sample of records looked like this: Composers, $1,530,000; publishers, $1,200,000; performing artists, $4,200,000; and record companies, $10 million.

He concluded:

"The foregoing analysis shows the performing artist to be—well ahead of—composers and publishers in the distribution of income generated by the broadcasts and sales of records, but rather far behind the record companies, and none of these figures takes into account the substantial revenues generated by live concerts."

Mr. Chairman, I submit that the Performance Rights Amendment does not belong in this copyright bill. It is recommended neither by the constitutional guidelines nor the economic marketplace. It fails to "promote the progress of science," it imposes an unreasonable burden on a symbiotic partner in the music industry, and promises windfall profits for those for whom no need can be demonstrated. For all of these reasons, we respectfully ask that you reject it.

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[1] Radio program "The Politics of Pop," June 5, 1975.

With me today, Mr. Chairman, as you have already indicated, is Mr. Krelstein, chairman of the Radio Board of Directors. He is Chairman of the Board of Blough Broadcasting Co. and operates six AM stations and six FM stations, and has been in the broadcasting profession for some 41 years. And also, Mr. Wayne Cornils, president and general manager of KFXD and KFXD–FM, Nampa, Idaho.

Mr. Krelstein does not have a prepared statement, but if it is within your time, he would like to make a few remarks.

Mr. Kastenmeier. Mr. Krelstein.

Mr. Krelstein. Thank you, Mr. Chairman. Without dwelling on other areas that have come up this morning, I would like to: (1) Present my own experience in the broadcasting business and hopefully get to the heart of the matter; and (2) I would like to read into the record a story that appeared in last night's Washington Star, which I think is germane to the problem, and touch on this issue of time for a moment, if I may.

But first, I have been in the business long enough to remember when Paul Whiteman and, I believe, Fred Waring sued to prohibit the playing of their music on radio stations, and they both lost. I was a full-grown adult, trying to make a living in the broadcasting business. When we talk about musicians, I was a full participant when the broadcasting industry struck ASCAP because of the prohibitive fees they wanted to collect from broadcasters, which resulted in the creation of Broadcast Music, Inc., some 35 years ago. Interestingly enough, touching on one segment of the music industry, this story really gets to the heart of the matter, and I am not going to read it all, because it is too lengthy.

This writer for the Washington Star apparently attended a show last evening, called Stars of the Grand Old Opry, and he goes on to say:

> For decades, when country music was called "hillbilly music" and was relegated to the agricultural hours of radio programing, the "Grand Old Opry" was a significant institution. It was a radio program that was the center of a way of life, a show which was a place for musicians, singers, and songwriters to be heard.
>
> At the same time, membership in the Opry was a valuable thing to an artist. It meant he or she could travel under the Opry banner and get bookings that were otherwise unavailable, be heard by people who were lured by the Opry name, be sought out by potential listeners to country music who could not hear it on the radio because only a handful of country stations existed.
>
> Now, all this has changed. Country music has become a major industry, and an enviably lucrative one as well. There are more than a thousand radio stations, north and south, that specialize in country music, and country musicians have no difficulty in getting bookings in places like the Capital Centre or Wolf Trap. They no longer need the Opry because they are making it on their own. They still perform at the Opry, at scale fees, because Opry membership requires it, but the big names aren't happy about it and tend to avoid the place as much as they can; the money is elsewhere.

The big question here is we have a picture of Mr. Elton John on the cover of the current issue of Time, with a five-page editorial about him. Among other things, it says in here that Music Corporation of America, for whom he records, guaranteed him $8 million in royalties against the albums that he produces in the next 5 years. The company says it could recoup its entire investment by the end of 1976. Elton has sold 43 million albums and 18 million singles, worldwide—9 of his 12 albums are over the million mark in the United States alone.

Two questions. Should Time magazine have paid Elton John a royalty for writing five pages about him and putting his picture on the cover? Or, should Elton John have paid Time magazine for writing about him, because this, combined with the exposure given him by the broadcasting stations, made him the popular artist he is today.

In 1955, we changed the programing of our broadcasting in Memphis, Tenn., to a format of music and the music we played was determined by surveying the tastes and the desires of the consumer, who, after all, is the last judge and jury on the acceptability of a product or service. And in surveying the record retailers, the record distributors, and members of the public at large, we found a certain category of music that we felt would appeal to the listeners. Strangely enough, at the same time that we did this, the sale of recorded music skyrocketed in the city of Memphis. Why? Because we were advertising the wares of the record companies on our radio station with time, and time is money. It is the only commodity that a broadcaster has to sell. So, in an indirect way, we did pay for the use of that music by the time we devoted to it on our station.

In 1964, we surveyed the city of Chicago, because we wanted to change the programing of our station there. And we thought perhaps we would provide the rebirth of country music, which had somewhat fallen to the wayside in terms of exposure in the key markets of America, and certainly Chicago can't be considered otherwise. It is the No. 2 market in our country.

To our amazement, we found that in the city of Chicago, and we surveyed record dealers in every neighborhood, in every area of that city, the maximum sales of country music at that time in certain areas of the city of Chicago did not exceed 10 percent. In 1965, I went into New York City and visited with the recording companies who had country music and asked them how they felt about our programing in this station in Chicago with country music, and they welcomed me with open arms. They offered us—said no charge, more music than we could possibly handle, and interestingly enough, and I remember well, one of the tunes at the time was a recording by Johnny Cash of Columbia Records, and the sales were dismal. But, literally, within a short period of weeks, when we did go on the air with country, Columbia couldn't ship the albums into the market fast enough, and I say to you that we did provide a service not only to the recording companies, but to that artist.

For example, on this past July 4, the Rolling Stones gave a concert in Memphis, Tenn., and used the stadium which holds over 50,000 people, and they filled it and this 1-day stand resulted in the Rolling Stones taking over a half million dollars out of the city of Memphis in box-office receipts. And I say to you, were it not for the fact that the product of the Rolling Stones was exposed by radio in this country, nobody would have known and nobody would have known today who the Rolling Stones are.

There is no use talking about the Beatles, because they left this country with millions and millions of dollars because of the exposure that they got on broadcast stations around this country, which made them a household word.

Elvis Presley, who is reputed to have an income of royalties of over a million dollars a year from the music he recorded for RCA, started

at our station in Memphis, Tenn., as a result of which his exposure of his records made it possible for him to do, as we call it, 1-night stands within a 300-mile radius of the city of Memphis and made a veritable fortune at a very, very early age.

To this extent, I think that broadcasting has paid indirectly, as it may be, for the use of this music, by making the Sinatras and the Johnny Cashs and the Charlie Prides and the Ray Prices and the Lynn Andersons, and so on down the line.

Thank you.

Mr. KASTENMEIER. Thank you.

Mr. Cornils, you have a statement.

Mr. CORNILS. Mr. Chairman, my name is Wayne Cornils. I own approximately 20 percent of the Idaho Broadcasting Co. and serve as president and general manager of KFXD/AM and KFXD/FM, Nampa, Idaho.

I am also privileged to serve as chairman of the Small Market Radio Committee of the National Association of Broadcasters. The other members of the Small Market Radio Committee operate broadcast properties in Deming, N. Mex.; Indianola, Miss.; Valdese, N.C.; Brattleboro, Vt.; and Mankato, Minn. The Small Market Radio Committee represents radio broadcasters in markets of 100,000 population or less.

The small-market broadcaster, in order to survive must be a person totally involved, completely dedicated to, and an integral part of the community he serves.

Much of what is defined as entertainment programing on a small-market radio station is provided in the playing of recorded music. In addition to the numerous other expenses of operation, the small-market broadcaster is required to pay monthly fees to several music licensing organizations, including BMI, ASCAP, and SESAC. The moneys thus paid are distributed by these organizations to the composers, lyricists, and publishers.

Now, Mr. Chairman, we are faced with the so-called performance rights amendment, which would require us, for the first time, to pay royalties to performing artists and record companies.

There can be no doubt in anyone's mind that the exposure given to recorded music by the broadcasting industry encourages and promotes the sale of records. In turn, the sale of records obviously encourages and promotes additional creative efforts by record companies and recording artists. Mr. Chairman, radio sells records.

In Boise, Idaho, a community of approximately 90,000, adjacent to the city of Nampa—Nampa is a town of about 20,000—in the two there are approximately 26 outlets where records may be purchased. All of these retailers would agree that exposure on radio provides the primary impetus for the purchase of records.

Last week, I spoke with a gentleman named Mr. Nelson Taylor, who is the manager of the Super Thrift Drug Stores in Nampa. Mr. Taylor told me, "If it were not for record exposure on radio, I would not have a record department."

And Bob Gordon, manager of the record departments of the Bon Marche Department Stores, told me that he has removed his record audition booths, as have most record stores, because the customers have already heard the records on radio.

Gary Pratt, the owner of Gary's Stereo, sells 8-track tapes and cassette recordings, a business by the way, which has developed as an outgrowth of the record industry. At Mr. Pratt's request, each week I send him the KFXD–AM record playlist. Mr. Pratt orders his tapes and cassettes directly on the basis of that list.

So, there can be no doubt in the minds of the managers in the 26 record outlets in the Nampa-Boise, Idaho area about the important role played by radio in the sale of records. Radio sells records.

Attesting to the recording artists' popularity due to radio exposure are the large fees which these artists are able to command for personal appearances. I have a colleague in Omaha who tells me that 15 to 20 recording artists or groups appear in that city during the course of a year. In Omaha, the minimum fee for a single appearance is approximately \$5,000—this for artists such as Jim Stafford, the Righteous Brothers and Dr. John. Others, like Alice Cooper and John Denver, receive \$20,000 to \$30,000, while some, like Elvis Presley, receive in excess of \$100,000.

In our own area in Idaho, the figures are very similar: \$15,000 for the Carpenters; \$25,000 for the Beach Boys; \$18,000 for Chicago; and for Elton John, a rather staggering 80 percent of the gross, against a guarantee of \$30,000. These fees are for a single performance or so-called one night stand in Boise, Idaho.

Radio not only sells records, but provides the audiences for recording artists.

In conclusion, Mr. Chairman, composers, publishers and lyricists receive compensation in the form of moneys paid by broadcast stations to the music licensing organizations. The record companies, artists and composers receive moneys from the sale of records—sales which are promoted by the exposure of their product on the radio.

In addition, the artists receive huge sums of money for personal appearances. As has been mentioned, the fees for personal appearances are determined by the artists' popularity and the artist's popularity is determined, to a large degree, by the exposure received on radio.

Mr. Chairman, to charge broadcasters an additional fee is unnecessary, unfair and unjust. It would place an extremely heavy burden on all broadcasters, and certainly including those of us in America's smaller markets.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Cornils and gentlemen.

I have just a couple of questions. I would observe a point made that radio sells records. I don't think it is challenged, but it doesn't necessarily go to the point of whether these so-called performances ought to have copyright protection, because many enterprises help sell what may be copyrighted material for which there are royalties due, but that has not much to do with whether or not the royalty should be paid. That is central to the question, it seems to me.

Also, from the preceding panel, it isn't a question so much of whether the Rolling Stones or Elton John or Elvis Presley or the Beatles are taken care of. They are. We know they are, however, they negotiate. It is, rather, at least the other panel made the proposition, that the other artists who may have creative input into these—into recordings, sound recordings, musicians, for example, largely anonymous and others perhaps not absolutely anonymous, but nonetheless, really

receive no particular residual remuneration or unusual remuneration in terms of whatever creative contributions they have made.

That is the question. It isn't, I don't think, a question of Elton John or Elvis Presley, nor is it a question of whether radio sells records. I think everyone concurs that it does.

But, as I pointed out, many enterprises sell copyrighted materials to the benefit of those creators without which some of these creators wouldn't do very well, but that doesn't mitigate—but, that doesn't go to the question of whether the so-called performance should be copyrighted.

I just make that observation.

I would like to ask Mr. Wasilewski now, those of you here this morning are broadcasters, but obviously there are others than broadcasters involved and there are others than broadcasters who are opposed to that which is recommended by your predecessors here at the witness table. I think they referred to the music operators, the juke box industry. There may be others as well. There may be educational broadcasters, background music, with economic interest in resisting this change, and there may be others I am not aware of.

Are you, from past testimony or past experience, are you aware of any other groups who are opposed to the proposal, other than broadcasters and those I have named?

Mr. Wasilewski. Other than broadcasters and those you have named, I am not aware—I was aware of the previous position of the record companies, as you referenced earlier this morning. I was aware of the ambivalence, I guess you would say, of the organizations representing composers and authors in times past. I think there—there is so much gold, you know, at the end of the rainbow and I think anybody would be concerned how that pot of gold is going to be divided up as far as royalty payments are concerned, but other than those that you have mentioned, I think that I am not aware of any, sir.

Mr. Kastenmeier. One of the concerns of those—some I have spoken with, who might otherwise oppose Mr. Danielson's addition to the copyright bill, his own bill, is a concern that we may be creating so many rights that it leaves prospective users of material in a jungle of having to clear rights not only in the first instance, a composer, of getting a royalty, but then additionally, as a performance royalty, and with the advent of more technology and computers that we may be creating rights and rights and rights on top of rights, and there is some question about whether we may make the whole area of copyright too complex to comply easily for users, whether broadcasters or anybody else, with the many statutorily created rights in the field. Do you have any comments on that?

Mr. Wasilewski. Well, I can see that point, and I am generally aware—as you know, I have been involved, in one way or another, with copyright over the course of some 20 to 25 years, but obviously, I do not deal with that on a day-to-day basis, but I am aware, generally, of the complexities of the copyright law and the technicalities involved therewith and I think that the concern that you are talking about is how do you make it easily accessable to reasonable, responsible utilization of this copyrighted material, and it occurs to me, and this is in reference to your first point that you are making, Mr. Chairman, that copyright is such a unique right granted in this country, subject

to so many limitations thereon, that we are talking not so much about a matter of copyright as we are a matter of employee rights as against employer or engagement as an artist as against the record company, rather than putting this all into the complicated field of copyright per se, and that is why I would generally agree with your comments—you didn't state them as a conclusionary fact, but the conclusion that I would reach based upon your first comments to me would lead me to believe that these are matters that should be basically taken care of in the employer-employee relationship, rather than a matter of copyright law.

Mr. KASTENMEIER. I have been notified my time has expired, so I yield to the gentleman from Massachusetts.

Mr. DRINAN. Thank you very much, Mr. Chairman.

I just want to thank you gentleman for appearing and I see the conflict between you and the authors and composers and I wish that you could resolve it somehow without resorting, as was just said, to the copyright law.

I simply have one question, Mr. Chairman, that one the international scene we heard earlier that artists and composers do, in other countries that have been named, receive this particular fee or statutory fee that has been mentioned. I wonder if anybody here would want to comment on that, and I have in mind in the background that we should, in my judgment, be moving towards a world copyright law, so that the rights of authors and composers, the rights of all parties involved, would be fixed pretty much by the law, the international law, or by treaties in Europe and Latin America.

I wonder if you would have any comments on this?

Mr. WASILEWSKI. Yes. That, of course, has been a matter of discussion over the years in the International Labor Organization where performer's rights, recording rights, whatever you would call it—it has gone by different names at various times—have been a matter of treaty. I would like to comment, however, that the great distinction between the operation here in this country and the operation in most other countries in the world is that we have developed sort of an economic equilibrium between the record companies and artists and radio broadcasters on the one hand, where both, in effect, benefit in a symbiotic fashion, as I indicated here. In the other countries of the world, by and large, who do not have the commercial radio broadcasting operation, and you have a government operated operation and the situations vis-a-vis the competitive nature of things in other parts of the world are not the same as they are here, that is, I think, why we have not been able to get together fully on an international copyright arrangement and agreement. So, I just think that the economic situation here is so different than it is in most other countries, either Latin America or Europe, and we have been able to develop this economic balancing of the respective financial interest, if you will, that I don't believe has made it necessary for us to incorporate this concept into the copyright concept.

Mr. DRINAN. One question that derives from that, how do you answer the argument that we heard earlier this morning that the authors and composers feel cheated? They feel they are not being benefited or rewarded for their creativity. Do you have any short answer or direct answer to that?

Mr. WASLEWSKI. I think you mean the recording artists in your question, sir.

Mr. DRINAN. Yes.

Mr. WASILEWSKI. Authors and composers are being reimbursed through ASCAP and BMI.

Mr. DRINAN. I am sorry. How do you answer that direct question?

Mr. WASILEWSKI. My response to it is, I think they are being rewarded by the play of broadcasting and their additional reward as far as the individual is concerned should accrue through their normal contractual relationships with these great artists who do so well, such as the Presleys and the Elton Johns and the backup men and drummers and other musicians I think should have a stronger negotiating position against the record companies and outstanding artists.

Mr. DRINAN. Thank you very much.

Mr. KASTENMEIER. The gentleman from Illinois.

Mr. RAILSBACK. May I ask how artists are traditionally paid? In other words, when they produce a record and that record is then offered to the public for sale, what is the breakdown as far as revenues, and so forth.

Mr. WASILEWSKI. Sir, I do not know the answer to that, to those breakdowns. I am not that knowledgeable about the recording industry per se.

Mr. RAILSBACK. I should have asked it to the other group. I think I am late one group. Does anybody know the answer?

Mr. WASILEWSKI. Maybe Mr. Dimling.

Mr. DIMLING. Mr. Railsback, I am not really an economist specializing in the record industry, but it is my understanding that typically artists have contracts with recording companies that call for a payment of royalties based on the sale of records.

Mr. RAILSBACK. I see.

Mr. DIMLING. These typically range from 3 to 10 percent, as one of the gentlemen on your panel suggested, based on the negotiating power of the individual artist. The figures that Mr. Wasilewski gave were based on assuming that the artists were so reimbursed.

Mr. RAILSBACK. Can you also answer this, if you are able: How are the musicians paid that play for an artist?

Mr. DIMLING. The musicians that—it is my understanding that the musicians are typically paid on the basis of contracts with the record companies. Very often, on union scale. They are not, incidentally, as a matter of course, part of the royalty arrangements.

Mr. RAILSBACK. Right. They would not receive any royalties.

Mr. DIMLING. That is my understanding as a matter of course, which I guess leads into a comment about Mr. Kastenmeier's concern for these artists. To the extent that they are engaged in creative performances, one could make the sort of argument for the record companies paying them royalties, which they don't do right now. It is strictly a matter of contract negotiations with the—between the artist and the record company. There are no royalties involved.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. The argument was made this morning that broadcasters were taking a very inconsistent position vis-a-vis this particular problem and the CATV issue. The CATV people that we heard made

essentially the same argument that you made this morning, that they, in fact, benefit the broadcasters, and that they charge no fee for that and that they certainly shouldn't be charged a fee for that. That does seem, at least on the surface of it, to be inconsistent. I would like a comment.

Mr. WASILEWSKI. I think I may understand how it may seem that way on the surface. However, in the case of the cable carrying of the broadcast signal, we are dealing with an already acknowledged subject of the copyright. In other words, a motion picture is now subject to copyright. A recording per se is not subject to the copyright in the sense of the performance attached thereto, and that is one clear distinction.

The other distinction is that the broadcasters are not per se in that proposed legislation, asking for payment to them for the use of their signal per se. They are asking for payment to the copyright proprietor for the use of that programing material by the CATV, by the copyright proprietor a motion picture producer, special sports interest, or what have you. So, I think there are substantial differences, between the two situations.

Mr. PATTISON. The other point that was made, and I think we ought to address ourselves to it, when an artist, even a star, makes his or her debut with the recording company, and does make a contractual deal for royalties, that is based upon records sold, but there is no way to make it based upon the number of times the record is played, because that—no one has any control over that, and that is one of the reasons that they argue for the performance royalty.

Mr. WASILEWSKI. Yes, sir.

Mr. PATTISON. There is no way that they can bargain on that. No matter how much power you have, or don't have, you can't bargain, because there is no way to determine, since anybody can play that by simply having this ASCAP or BMI or SESAC license, that you have no way to make any bargain on that.

Mr. WASILEWSKI. The number of times that record is played, it usually is related directly to the amount of sales of that record, too, so there is that indirect benefit and payment. Also, I have asked numerous of my radio station members have they ever been the recipient of a request of one of the stars or performing artists, please don't play my record, and that has not been done very often.

Mr. PATTISON. I have no further questions.

Mr. KASTENMEIER. Let me ask just one last question.

Would you agree or disagree that the contributions made by musicians and others, apart from those that are covered by royalty contracts referred to in negotiations, would you agree that those contributions are creative, creative within the meaning of the copyright law?

Mr. WASILEWSKI. Sir, I would go that far to indicate that they are creative, and at the end of my statement, I indicate that they are creative. However, I have not gone to the point that it is necessary under the Constitution to give that added right, namely, the performance right, to that creative rendition in order to augment the creativity involved.

Mr. KASTENMEIER. Thank you. I thank all you gentlemen for your appearance here this morning.

Mr. WASILEWSKI. Thank you.

Mr. KASTENMEIER. This concludes the hearing today on the performance rights, sound records, and after the August recess, on September 11, this committee will convene to hear testimony on a related question, that of mechanical royalties, which some of the witnesses here this morning are also interested in.

Until that time, the subcommittee stands adjourned.

[Whereupon, at 12:40 p.m., the subcommittee recessed, to reconvene on September 11, 1975.]

[The subcommittee has received statements for the record as follows concerning H.R. 5345: Department of State; Department of Commerce; Librarian of Congress; National Endowment for the Arts; American Broadcasting Companies, Inc., National Broadcasting Company, Inc., Music Operators of America, Inc.; and juke box manufacturers represented by Perry S. Patterson, Esq.]

DEPARTMENT OF STATE,
Washington, D.C. July 16, 1975.

Hon. PETER W. RODINO, Jr.
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: The Secretary has asked that I respond to your letter of April 2, 1975 requesting the Department of State's views on H.R. 5345, to amend the Copyright Act, and for other purposes.

This legislation relates to the payment of fees for certain public performances of sound recordings. Essentially the legislation is of a domestic nature and does not have foreign policy implications. Therefore the Department of State would defer to the views of other interested agencies.

The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to the submission of this report.

Sincerely yours,

ROBERT J. MCCLOSKEY,
Assistant Secretary for Congressional Relations.

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,
Washington, D.C., July 8, 1975.

Hon. PETER W. RODINO, Jr.
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Commerce with respect to H.R. 5345, a bill: "To amend the Copyright Act of 1909, and for other purposes."

H.R. 5345 would amend Chapter 1 of the Copyright Act (17 U.S.C. §§ 1–32) to establish performance rights in sound recordings. It would create compulsory licensing for the public performance of sound recordings, establish annual royalties for compulsory licenses, and require that such royalities be divided equally between the performers and the copyright owners of a sound recording.

Section 2 of H.R. 5345 would replace subsection (f) of 17 U.S.C. § 1 with a new subsection (f) granting the owner of a copyright in a sound recording the right to perform it publicly for profit in addition to the existing rights of reproduction and distribution. However, none of the rights would extend to imitative but independently produced sound recordings. The subsection would also make the public performance of a copyrighted sound recording subject to compulsory licensing once the copyrighted sound recording is distributed to the public under the authority of the copyright owner.

Section 3 of H.R. 5345 would add a new section 33 to Chapter 1. Subsection (a) would establish specific royalties to be paid of compulsory licenses for the public performance of sound recordings but would allow a negotiated license to be substituted if such negotiated rate were higher than the specified royalty fees.

Yearly performance royalty rates for radio and television broadcasting stations would be based on a station's gross advertising receipts with royality exemptions for stations whose gross advertising receipts are below specified minimum amounts. A radio station whose gross advertising receipts are higher than $200,-000 a year could utilize an alternative prorated rate taking into account the amount of the station's commercial time devoted to the playing of copyrighted sound recordings. For background music services and other transmitters of performances of sound recordings, a yearly blanket rate would be based on the gross receipts from subscribers or others who pay to receive the transmission during the applicable period with a prorated rate taking into account the proportion of time devoted to musical performances by the transmitter during the applicable period available for utilization in the alternative. Background music services or other transmitters whose annual gross receipts from subscribers or others who pay to receive the transmision fall below a minimum amount would be exempted from the payment of royalties. Operators of coin-operated phonorecord players would be subject to a royalty of $1.00 per phonorecord player per year. For all other users not otherwise exempted, there would be a blanket rate of $25.00 per year or an alternative prorated rate not to exceed $5 per day of use based on the number of separate performances of such works during the year. Subsection (b) would make the annual royalty fees established in subsection (a) applicable for a period of not less than two years following the date of enactment of the bill and until a negotiated royalty rate is agreed upon by the copyright owner and the licensee. In the event that the parties cannot agree upon a royalty rate pursuant to negotiation, the public performance of the sound recording would be made subject to compulsory licensing at a royalty rate and under terms set by an arbitration panel. Subsection (c) would require that royalties be equally divided between the performers and the copyright owners of a sound recording.

Although within the broad category of intellectual property rights, the subject matter of this bill does not directly relate to any of the Department of Commerce's programs. However, it is the Department's understanding that the creation of performing rights in sound recordings is a highly controversial issue in this country. We note that the lack of protection for these performing rights causes problems internationally in view of the fact that many other countries do grant such rights. In view of the controversy surrounding this issue we believe that the subject bill would be appropriate for Congressional hearings.

We do, however, have some technical recommendations regarding the proposed bill. Section 2(4) reads: "by inserting immediately before the period at the end of the last sentence of such section (relating to coin-operated machines) a comma and the following "except that the provisions of this sentence shall not apply to the public performance of a sound recording under subsection (f) of this section".

Since section 2(4) refers to coin-operated machines it appears to amend existing 17 U.S.C. § 1(e). If so, a technical drafting error arises because section 2(2) would have already deleted the period referred to in section 2(4). If such is the case, the error could be corrected by deleting both the semicolon and the word "and" appearing in the last line of proposed subsection f(2); by deleting section 2(4); and by substituting the following for proposed section 2(2): "by striking out the period at the end of subsection (e) and inserting in lieu thereof a comma and the following "except that the provisions of this sentence shall not apply to the public performance of a sound recording under subsection (f) of this section; and"

We would also note that H.R. 5345 fails to indicate where royalties are to be paid or how and when they are to be distributed. Presumably, these matters would be negotiated or arbitrated between the parties two years after the date of enactment of the bill. However, to avoid confusion, we believe that provisions for interim royalty payment and disbursement should be added to this bill. In this regard, we would suggest that the provisions of section 114 of S. 1361, as amended by the Senate Committee on the Judiciary, July 3, 1974, could be adopted to serve this purpose.

We have been advised by the Office of Management and Budget that there would be no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

B. PARRETTE,
Deputy General Counsel.

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THE LIBRARIAN OF CONGRESS,
Washington, D.C., June 11, 1975.

HON. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. RODINO: This is in response to your request of April 2, 1975 for comments on H.R. 5345, 94th Cong. 1st Sess., to amend the Copyright Act of 1909.

The purpose of H.R. 5345 is to establish performing rights in sound recordings for the benefit of record producers and performers. Although most public performances of sound recordings result in a copyright royalty for the composer of the underlying music, no royalties accrue to record manufacturers or performers. As a result, industries which are dependent on the performance of sound recordings, such as broadcasting organizations, jukebox operators and producers of background music, pay nothing to those responsible for producing such sound recordings other than the original purchase price of the records.

Whether a performance right should be extended to sound recordings has been a controversial issue in the United States for many years. Initial versions of the copyright revision bill, considered in Congress during the last decade, did not include a performance right in sound recordings. This omission was essentially due to concern that the controversial nature of the issue would unduly delay enactment of the much needed revision. This view was articulated by the Register of Copyrights in his Supplementary Report on the 1965 Revision Bill:

"[W]e cannot close our eyes to the tremendous impact a performing right in sound recordings would have throughout the entire entertainment industry. We are convinced that, under the situation now existing in the United States, the recognition of a right of public performance in sound recordings would make the general revision bill so controversial that the chances of its passage would be seriously impaired." [Pages 51–52]

When the revision bill stalled in the late 1960's, extensive record and tape piracy forced Congress to consider separate legislation affording copyright protection for sound recordings. In the fall of 1971 Congress amended the 1909 Copyright Act to establish a so-called "limited copyright" in sound recordings. Under this amendment only those sound recordings fixed and published on or after February 15, 1972 are eligible for protection and must, as well, comply with a notice requirement.

The protection afforded sound recordings is termed "limited" because only the unauthorized reproduction and distribution to the public of copies of the sound recording is prohibited. Thus, the duplication of sound recordings for private, personal use and the performance of sound recordings through broadcasting or other means are outside the scope of the amendment.

The constitutionality of the 1971 amendment was attacked in *Shaab* v. *Kleindienst*, 345 F. Supp. 589 (D.C.C. 1972) on the grounds that sound recording material could not be considered as the "writing of an author." The Court rejected this argument and held that the copyright clause of the Constitution had to be interpreted broadly in order to incorporate technical advances which were unknown to our founding fathers.

The revision bill introduced by Senator McClellan in the 93rd Congress (S. 1361) included a performance royalty for sound recordings which was subject to compulsory licensing (section 114). Although a negotiated license could be substituted for the compulsory license, the bill provided that negotiated royalty fees could not be less than the compulsory rate. The bill outlined the procedures to be followed in obtaining a compulsory license and also provided for the deposit of the required royalty fees with the Register of Copyrights. In the absence of a negotiated license, failure to comply with the specified requirements would render the public performance of a sound recording an infringement, subject to the civil remedies established by other sections of the bill.

The royalty fees were to be computed on either a blanket or a prorated basis; the blanket fees for broadcast stations ranged from no liability for stations with gross receipts under $25,000 to one percent of the net sponsor receipts over $200,000. For all operators of background music services with receipts over $10,000 the blanket rate was established as two percent of gross receipts from subscribers.

The bill directed the Register of Copyrights, after deducting reasonable administrative costs, to distribute the funds deposited to eligible owners and performers or their designated agents, and provided further that "one half of all royalties

to be distributed shall be paid to the performers of the sound recordings for which claims have been made . . ." In the event of a controversy concerning the distribution of funds, the Copyright Royalty Tribunal would have been convened to resolve it.

Although proponents of the performance right for sound recordings had sufficient support in the Senate Judiciary Committee to report the bill with the record performance royalty included, there was substantial opposition to the provision in the Committee. Essentially two general arguments were advanced in opposition to the performance royalty—one constitutional, the other public policy.

Concerning Article 1, Section 8, Clause 8 of the Constitution it was argued that for the purposes of recognizing a performance right in sound recordings, record manufacturers and performers were not "authors." While acknowledging that sound recordings were protectible to the extent established by the 1971 amendment, the minority seemed to feel that further protection for record manufacturers and the recognition of certain rights of the performer stretched the meaning of "author" too far.

On the public policy question it was argued that record manufacturers and performers were actually benefited by public performances of their recordings since it served as free advertising. It was also argued that, since organizations performing sound recordings usually pay composers copyright royalties, to be required to pay additional royalties to record manufacturers and performers would be an economic hardship. In addition, fixing the compulsory licensing rate on gross receipts was attacked on the ground that it was not related to ability to pay, since, the overall profitability of a given station was not a factor. Finally, it was argued that record companies were already more profitable than broadcast organizations, and that additionl revenues flowing from broadcasters to record manufacturers would only serve to increase the imbalance and thereby retard the development of the communications industry.

In Senate Report 93–983, 93rd Congress, 2d Session, the majority responded to these arguments. On the constitutional issue, the Report cited *Capitol Records, Inc.* v. *Mercury Records Corp.*, 221 F. 2d 656 (2d. Cir. 1955), which indicated that sound recordings could be protected under federal law if Congress chose to enact such protection. By establishing the "limited copyright" protection for sound recordings in 1971, Congress concluded that such material was a "writing" within the meaning of the Constitution and this conclusion received judicial sanction in *Shaab* v. *Kleindienst*, 345 F. Supp. 589 (1972).

A telling argument in favor of a performance right for sound recordings lay in the seemingly contradictory position of the broadcast organizations as related to their own performance of sound recordings as opposed to the use by cable television of such copyrighted materials. The position of broadcasters towards cable has long been that the use of broadcast signals should require equitable remuneration since intellectual property is being exploited for profit. Since the revision bill would establish a compulsory licensing system for cable transmission the majority argued that it was only fair to apply the same principle in regard to the broadcasters' use of intellectual property.

An additional argument advanced by the majority was that the financial data clearly indicated an ability to pay by broadcasters and jukebox operators. Moreover, it was pointed out that a substantial number of European countries recognized a performance right in sound recordings.

Although proponents of the performing rights amendment had sufficient support in the Senate Judiciary Committee, greater opposition arose on the floor of the Senate when the bill was debated. Ultimately, following debate on the merits of a record performing right, the Senate voted to delete the measure. As a result, the revision bill passed the Senate in the last session of the 93rd Congress without the record performance right provision.

H.R. 5345 by Mr. Danielson, would establish a performance right in sound recordings within the context of the 1909 Copyright Act. As the Register of Copyrights commented to Senator Scott in a letter of July 31, 1974, we have no doubt as to the constitutionality of a record performance royalty;

"Performing artists contribute original, creative authorship to sound recordings in the same way that the translator of a book creates an independently copyrightable work of authorship. Record producers similarly create an independently copyrightable work of authorship in the same way that a motion picture producer creates a cinematographic version of a play or novel. In my opinion, the contributions of both performers and record producers are clearly the 'writings

of an author' in the constitutional sense, and are as fully worthy of protection as any of the many different kinds of 'derivative works' accorded protection under the Federal copyright statute."

Since record performances are constitutionally capable of copyright, the sole issue is one of policy. We support the principle of legislation to protect record performances, but remain concerned over the possible adverse effect such legislation may have on the program for general revision. H.R. 5345 has been proposed as separate legislation, but it presumably could be incorporated in the general revision program at some point. As a separate bill, certain technical adjustments would probably be necessary to make the proposal workable. While the bill is patterned after section 114 of the revision bill in the 93rd Congress, no agency is designated in H.R. 5345 to receive compulsory license fees for distribution; also, there is no anti-trust exemption to facilitate voluntary royalty agreements or agreements about distribution of the fees.

The Copyright Office and the Library of Congress endorses the general principle which H.R. 5345 seeks to advance. If it becomes apparent that legislation for this purpose cannot, as a practical matter, be included in the bill for general revision of the copyright law, we hope that it will be given favorable consideration as separate legislation in the future.

Sincerely yours,

JOHN G. LORENZ,
Acting Librarian of Congress.

NATIONAL ENDOWMENT FOR THE ARTS,
Washington, D.C., July 31, 1975.

Hon. ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to the request of Herbert Fuchs, Counsel to the Subcommittee, for our views and comments on H.R. 5345 to amend the Copyright Act of 1909 by providing a performance right in copyrighted sound recordings.

The National Endowment for the Arts is aware that the Sound Recording Amendment of 1971 provides for a statutory copyright in sound recordings and for the first time extends copyright protection to the original performances of recording artists and musicians, and the creative technical expertise of record companies. We note, however, that the Amendment, while recognizing the talent, originality, and value of the creative efforts of these individuals, includes no provision for compensating them when others use the copyrighted sound recordings for profit making purposes. Undoubtedly, it is a performing artist's personal rendition that brings to "life" the work of music composers and lyricists; and, a record producer's ability to creatively capture, electronically process, compile, and edit sounds that enables broadcasters to utilize recording artists' unique performances again and again to fill their commercially available time. We therefore wholeheartedly support H.R. 5345 which, by subjecting the public performance of sound recordings to a compulsory license, would require radio and television broadcasters, jukebox owners, and other transmitters of copyrighted sound recordings to pay a performance royalty in the form of an annual licensing fee to the performer and copyright owner of the recording.

It would not appear that paying such a performance royalty to recording artists, musicians and record companies (as copyright owners of the sound recording) would impose a financial burden on the broadcast industry. As proposed in Section 3 of H.R. 5345, royalty fees would vary according to the amount of gross receipts received by a broadcast station from commercial sponsors. The stations, in turn, could pass on the additional expense to advertisers who are the ultimate financial beneficiaries of the recording artist's contribution to a station's programming.

Further, according to Section 3(c) of the proposed bill, royalty fees are to be divided equally between the performers and copyright owners of the sound recording and neither may assign his right to royalties to the other. We favorably note that this language will preclude the performer or copyright owner from obtaining all of the benefits intended to be divided between them.

Although we support the general concepts of H.R. 5345, we would like to see it incorporated into the general legislation on copyright revision. If it becomes

apparent that legislation of this type cannot be included in the general bill, we recommend favorable consideration of separate legislation.

In conclusion, the National Endowment for the Arts strongly believes that musicians and record companies who contribute their creative efforts to the production of copyrighted sound recordings should share in the income enjoyed by radio and television stations and other commercial organizations who use the recordings for profit.

The Office of Management and Budget has advised us that it has no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

NANCY HANKS,
Chairman.

AMERICAN BROADCASTING COMPANIES, INC.,
New York, N.Y., August 7, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. KASTENMEIER: American Broadcasting Companies, Inc. (ABC) wishes to provide your Subcommittee with its comments on H.R. 5345, a bill to extend to record companies and performers a public performance right in sound recordings parallel to existing federal copyright provisions granting public performance rights to composers.

ABC believes that H.R. 5345 would be an unwise and unnecessary extension of the copyright laws.

ABC is a major user of sound recordings; ABC's stations, and radio stations in general, are important outlets for the dissemination to the general public of recordings. It is a known fact that broadcasters greatly stimulate record sales by exposing new releases, and particularly those of relatively unknown artists, to potential buyers. Radio stations contribute immeasurably to the popularity of recordings and therefore to the profits enjoyed by record manufacturers and performers alike. As radio play provides effective advertising and creates consumer demand, it is not surprising that record companies expend considerable efforts promoting the use of their material on the air. Unlike most advertising, which can only be descriptive of a given product, radio broadcast provides the potential buyer with a precise appraisal of the product.

Composers, record companies, and performers pay nothing for this valuable promotional effort. Legal and business considerations preclude broadcasters from charging for their use of such material. H.R. 5345, however, would *compel* broadcasters to pay those for whom air play already provides, directly or indirectly, major benefits. In addition, ABC, like all broadcast users, pays substantial amounts for performance rights to the music rights groups such as ASCAP and BMI, Inc.

It is argued that record companies and performers do not share equitably in the revenues generated either by broadcast or payments to the music rights groups. Uncompensated public performance of records produced jointly by record companies and performers, it is said, respresents an expropriation by certain record users, principally broadcasters, of economic benefits to which record producers have a legitimate claim.

ABC finds this argument unconvincing and doubts that the proposed statute would even achieve its intended purpose of allocating a greater share of revenues to record companies and performers.

Professors Robert L. Bard and Lewis S. Kurlantzick recently published an article evaluating the issue of public performance rights for record producers in terms of economic theory and equitable and legal consequences.[1] They find no convincing argument for granting record producers such rights. Record public performance rights, they conclude, will not redress alleged injustices to musical artists whose records continue to be broadcast long after the exhaustion of their sales potential. Composers, rather than record companies and performers, would be the most likely beneficiaries of such a revision. Any benefits that accrued would not fall equally to performers and record companies, as many

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[1] Bard and Kurlantzick, *A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It,* 43 Geo. Wash. L. Rev. 152 (1974).

believe, but would be divided according to the relative bargaining powers of the parties involved, and according to a complex set of economic and legal factors which statutory mechanisms cannot adequately comprehend.

ABC concurs in this opinion and believes the following excerpts from the Bard and Kurlantzick article aptly summarizes the difficulties confronting proponents of H.R. 5345:

"Amending the Copyright Act confronts an important principle which also is relevant to the formulation of copyright policy generally, indeed, to all economic regulation. At times there are desires to restructure the benefits of copyright law to favor creators—authors, composers, and performers—more, and the commercial participants in the creative and distribution process, such as publishers, record companies and broadcasters, less. It may be that authors and artists "deserve" a larger share of the revenues generated by the exploitation of their work, but it may not be possible to achieve this through changes in the copyright law. Whatever the initial allocation of rights in creative work under the law, a large part of these rights must be assigned to others in order to render them capable of returning significant income to their original holders. The author must usually deal with a publisher, the performer with a record company, etc. The author's success will depend less on the statutory rights which he initially possesses than on the variety of economic factors which determine his relative bargaining strength. In most circumstances, attempts to strengthen a weak bargaining position through granting an author or artist additional legal rights which affect one part of the economic relationship with a publisher or record company may be frustrated by a compensating adjustment in the remaining relationship." [2]

Under H.R. 5345 income attributable to the sale and performance of recorded music would be transferred from broadcasters to record companies and popular performers. Yet both these groups are prospering under the existing copyright regime. Record companies presently enjoy sufficient incentives to produce a very large output of new recordings. Performers are already compensated for their ability to produce records attractive to broadcasters.

As the National Broadcasting Company points out in its Statement to the Subcommittee of July 23, 1975, many successful recording artists, those most likely to benefit by the proposed statute, have their own recording companies and record under their own labels. These artists would reap an additional benefit in their dual capacity as performers and record company proprietors.

Furthermore, lesser known performers who are in the employ of recording companies are unlikely to gain measurable benefits from H.R. 5345. Although an equal division of performance right royalties is contemplated, experience dictates that legal and economic factors existing outside the statutory framework may effect a distinctly different ultimate allocation of revenues. Such has been the practice in the area of mechanical reproduction rights, whereby record companies usually obtain voluntary licenses from composers which permit them to avoid compulsory licensing provisions (17 U.S.C. § 1(e) (1970)). There is little reason to doubt that similar arrangements would result in practice as between performers and record companies.

The situation as to classical music is somewhat different from that of popular music. The argument has been made that the less popular arts, which by definition, do not have the ability to generate mass sales, ought to enjoy the augmented royalties which H.R. 5345 theoretically would provide. It is conceivable that a certain negligible benefit would flow to makers of classical records.

Most classical music is uncopyrighted; therefore, there is no music copyright holder to whom record producers must pay mechanical reproduction right royalties. Thus the classical record makers could retain all earnings from public performances. Bard and Kurlantzick conclude upon analysis of the peculiarities of this specialized market that classical records will not earn sufficient revenues from public performance fees to have any appreciable impact upon the production of classical records.

Classical music may need and deserve financial support as an independent matter, but establishing a record public performance right of wide applicability to producers of records of all types and tastes will only produce limited benefits, too small to affect classical record production and too small to justify wholesale legislation. Moreover, considerations bearing on the desirability of encouraging the production of classical records ought to be addressed in more appropriate legislation with narrower focus.

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[2] *Id.* at p. 160, footnote omitted.

In sum, ABC opposes creation of a public performance right for record companies and performers as inconsistent with practical realities and as an unwise and unfair burden on broadcasters. Such a newly imposed obligation would also undermine the existing mutually beneficial relationships among record companies, performers and broadcasters.

Thank you for the opportunity of presenting these comments.

Very truly yours,

EVERETT H. ERLICK.

STATEMENT OF NATIONAL BROADCASTING CO., INC.

National Broadcasting Company, Inc. ("NBC") respectfully makes this statement concerning H.R. 5345, a bill which would create a "performance right" in the use of copyrighted sound recordings for the benefit of record companies and performers.

We question both the logic and public benefit of the proposed statute and therefore do not support its passage.

Proponents of H.R. 5345 argue that the creation of a performance right is necessary to create a new source of revenue for lesser-known performers and musicians who work for record companies. We doubt that the proposed statute will have that effect, even assuming that such an objective is a valid subject for national legislative policy.

In the first place, 50 percent of the performance fees provided for in the statute would go to record companies, not performers. Nothing would compel these companies to use this money to pay performers.

Secondly, only those musicians and performers whose sound recordings are actually broadcast can benefit from or be compensated under the proposed legislation. Since the records that are most often played on radio and television are those of the most popular and well-known performers, lesser-known musicians and artists will benefit very little. The more popular performers—most of whom are already highly paid—will undoubtedly get the lion's share of the remaining 50 percent of the proposed performers' fees.

In this regard, it should also be noted that many successful recording artists today own their own recording companies and record under their own labels. The proposed statute would give these artists the double benefit of receiving royalties in their dual capacity as performers as well as record company owners.

The record industry is a multi-billion dollar enterprise. It grew to this size without subsidization from the broadcasting industry, and it is clearly able to survive without the imposition of these additional fees.

Broadcasters already pay substantial sums for the right to play music on the air. In 1973, for example, broadcasters paid over $80 million in music license fees.[1]

These payments remunerate the people who create artistic property and thus serve the policies of the copyright laws. H.R. 5345, on the other hand, does not square with the underlying objectives of copyright. The Constitutional purpose of copyright is to protect the "writings" of "Authors". Requiring such payments to performers will neither encourage them to be "Authors" nor result in their creating new "writings". This is not what the Constitutional copyright mandate was intended to achieve.

Singling out, in effect, the broadcast industry to shoulder the burden of these additional performance fees is unwarranted. It is an economic reality that a good deal of the monies received by record companies and performers through record sales are directly attributable to the broadcasting of records. For years, record companies have supplied records to broadcasters without charge in recognition of the incalculable promotional value of having their records played on the air. H.R. 5345 would compel broadcasters to pay record companies for the "privilege" of increasing such companies' profits from record sales. This neither makes sense economically nor comports with the Constitutional purpose of copyright.

NBC believes that the compensation of performers should be left to private negotiation. If the Congress truly believes that the public interest is served by increasing the compensation of undiscovered or lesser-known talent, it should not impose that burden on the broadcasting industry. We believe this area is better left to free negotiation between the representatives of the performers

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[1] FCC 1973 Financial Data ; 1974 data not yet available.

and the record companies who are, properly, the parties at issue on the question of compensation of performers.

We thank this Subcommittee for the opportunity to state our views on H.R. 5345.

STATEMENT OF RUSSELL MAWDSLEY, IMMEDIATE PAST PRESIDENT AND CHAIRMAN OF THE LEGISLATIVE COMMITTEE OF MUSIC OPERATORS OF AMERICA, INC.

Mr. Chairman, I am Russell Mawdsley of Holyoke, Massachusetts. I submit this statement in behalf of Music Operators of America, Inc., in opposition to H.R. 5345, which is referred to as the Performance Rights Amendment of 1975. Music Operators of America, Inc. (MOA), is the national organization of jukebox operators which has members in every state of the Union. I am the immediate past president of the organization and presently serve as chairman of its national legislative committee.

I am president of Russell-Hall, Inc., a firm which operates jukebox, amusement machines, and a full line of vending machines in the greater western Massachusetts area, an area which is centered around the city of Springfield, Massachusetts. My firm operates about 100 jukebox, 150 amusement machines, and 700 vending machines, in about 450 locations in this area. I am also active in local associations of jukebox operators and in business and civic organizations in my home city of Holyoke, Massachusetts.

I wish to register the strong opposition of Music Operators of America to H.R. 5345, the provisions of which are substantially similar to provisions for performance royalties for record manufacturers and performers which were deleted from the Copyright Revision Bill (S. 1361, 93rd Congress) when the Senate considered and passed that Bill and referred it to the House of Representatives in September 1974.

H.R. 5345 would add $1.00 per jukebox per year to the new jukebox royalty of $8.00 per machine per year that would be created by the pending Copyright Revision Bill, H.R. 2223, 94th Congress. That new $8.00 royalty was adopted as a compromise when the House of Representatives considered and passed a copyright revision bill several years ago. Later, the Copyright Subcommittee of the Senate Judiciary Committee also adopted the $8.00 royalty out of a desire to conform to the rate provided in the copyright legislation passed by the House of Representatives (Senate Report 93-983 on S. 1361, 93rd Congress, page 152).

Music Operators of America, Inc., opposes H.R. 5434 for the following reasons:

1. It would upset the compromise agreement by which the proposed $8.00 jukebox royalty was first established. That proposal, I should add, was intended to replace the existing exemption of coin-operated musical performances from performance fees, by a fixed statutory royalty, that would serve as a maximum limit on jukebox royalties. Before that $8.00 royalty can become fixed in our statutory law, however, we are now seeing new efforts to increase jukebox operators' liabilities under the copyright law.

2. The proposed new royalty would add a new burden of at least $450,000 a year ($1×450,000 machines) to an industry of small businessmen, who already will be burdened by some $3,600,000 ($8×450,000 machines) in new jukebox royalties and by at least $4,500,000 (6 cents×75,000,000 records) in mechanical royalties, under Sections 115 and 116 of H.R. 2223, the pending Copyright Revision Bill.

3. We wish to impress upon the Committee the fact that the jukebox industry is an economically depressed industry. Like most other industries, the costs of our equipment and materials have been rising drastically. Our singles records now cost on an average 75 cents per record, which is a marked increase from the 60 cents which a typical operator reported to the House Judiciary Committee at its hearings in 1965 (Hearings on H.R. 4347, 89th Congress, Part I, page 570). Wages of our electronic and mechanical technicians and our other costs of operations have risen even more drastically, and are continuing to rise.

On the other hand, jukebox operators are unable to increase prices per play so as to keep abreast of their increasing costs of operations. In some businesses, prices can be increased merely by changing the price tag, and the change may not be noticed. In our industry, it is a matter of reducing the number of songs a customer can play for a quarter, and also of changing the coin receiving mechanism on every one of the operators' machines. Also, the location owner must be consulted and his consent obtained, for he may object that a raise in the cost to play music will be detrimental to his business. Prices of two plays per quarter

have been established by operators in some areas, but this is by no means generally accepted. In many areas, rates are still at 10¢ per play or three plays for a quarter, and there are even some areas where the rate remains at 5¢ per play.

These conflicting and continuing pressures have necessarily and inevitably resulted in a general reduction in the level of operators' income from operation of jukeboxes. This economic picture explains why almost all operators have diversified their activities by adding amusement and vending machines to their jukebox operations. In fact, I am quite certain from my own experience that most operators cannot afford to operate jukeboxes unless they also operate amusement and vending machines. Further emphasizing the serious economic condition of the jukebox industry was discontinuance, in 1974, of the manufacture of jukeboxes by the Wurlitzer Company, which was one of the four American manufacturers of jukeboxes.

4. Jukebox operators serve as promoters of records, and contend, therefore, that they provide a service to performers and record companies which is of sufficient benefit to obviate any claim of the payment of royalties for play of records on jukeboxes.

5. Record manufacturers and performers, traditionally, have secured compensation for their recordings through contractually negotiated royalties. They do not need added Congressional assistance to demand and receive adequate compensation for their recordings. Just this week, for example, *Billboard* magazine is reporting a $9,900,000 distribution to musicians throughout the United States from Phonograph Record Manufacturers Fund, a fund which provides annual distributions to musicians, and was created by private contractual negotiations without the intervention of Congress. A copy of the *Billboard* article is attached hereto and made part hereof. We urge the Committee, therefore, to require record manufacturers and performers to come forward with proof that any such Congressional assistance is needed before any such statutory benefits are conferred upon them.

6. In the face of continuing reports of "payola" in the recording industry we question whether record manufacturers can demonstrate their competence or entitlement to statutorily created royalties which would only aggravate a problem that industry seems unable to control.

7. We also oppose a statutory royalty for record manufacturers and performers because we believe Congress lacks the power to confer such benefits upon them. In our view, record manufacturers, particularly, are not "authors" within the meaning of the Copyright Clause of the Constitution. In giving equal benefits to record manufacturers, along with performers, we believe this Bill is fatally defective and cannot stand.

8. Finally, we oppose any new royalty for the recording arts as a matter of principle because we believe that there should be but one royalty for any one performance, and that if Congress creates any new kind of musical copyrights they should be shared in a single royalty among all those who claim to have contributed to the finished product.

In closing, I would like to state to this Committee that within the jukebox industry there have been, and still are, many who vigorously oppose the creation of any performance royalty to be paid by jukebox operators. This is because they believe jukebox operators perform a compensating service in the play of music on their machines. Any proposal to impose a new royalty upon jukebox operators would substantially intensify that opposition and would make it increasingly difficult for the industry's leaders to preserve support for the provisions of the Copyright Revision Bill as the industry's representatives have agreed to them.

We earnestly urge your Committee, therefore, to disapprove the Bill, H.R. 5345.

Thank you for giving us this opportunity to present the views of Music Operators of America, Inc.

[From Billboard magazine, July 26, 1975]

MUSICIANS TASTING FAT $9.9 MIL MELON

(By Is Horowitz)

NEW YORK.—One busy horn player in Los Angeles will bank an extra $35,000 next week when he receives his slice of the $9,915,620 melon to be distributed by the Phonograph Record Manufacturers Special Payments Fund.

Checks going out Aug. 1 represent the largest payoff since the fund was established in 1964. The total is some 30 percent over the $7.6 million dispensed in

1974. This year's sum will be divided among just over 41,000 union musicians, also a record number, who played at least one record date during the past five years.

Smallest checks, for $9.90, will go to those who played only a single date in 1970, and none since. But 775 frequently-employed AFM stalwarts will get more than $5,000 each.

Name of the Los Angeles sideman is being withheld by fund guardians, but his $35,000 "royalty" places him at the work summit of all musicians playing for recordings.

The fund's bankroll comes from record manufacturers who contribute .05 percent of their gross sales at suggest list, less a 15 percent packaging deduction and an additional allowance of 20 percent for free goods on product recorded under AFM jurisdiction. Material recorded abroad is exempt, even though manufactured and sold in this country or Canada.

Eight AFM locals, with Los Angeles' Local 47 well out in front at 35 percent, will share in 80 percent of the fund money, a breakdown of the payout shows. New York's Local 802 accounts is second at 19 percent, and Nashville's Local 257 accounts for 15 percent of the total.

After these power jurisdictions the falloff in recording work and fund payoffs is rapid. Chicago accounts for 3 percent; Memphis, Detroit and Toronto about 2.5 percent each; and Montreal 1.5 percent.

Manufacturer payments to the fund are due semi-annually on Feb. 15 and Aug. 15. Books are closed on April 30 each year in calculating musician shares. While most credit to sidemen is given for recordings made during the most recent accounting period, lesser credit is given, on a descending scale, to session work going back over five years. This is to provide some continuing payment to recording musicians, according to a fund spokesman.

PERRY S. PATTERSON,
Coudersport, Pa., July 30, 1975.

Re H.R. 5345.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice; House Judiciary Committee, Rayburn House Office Building, Washington, D.C.

DEAR CHAIRMAN KASTENMEIER AND MEMBERS OF THE SUBCOMMITTEE: I write as counsel for the Rock-Ola Manufacturing Corporation, The Seeburg Corporation, and Rowe International, Inc., the only manufacturers of coin operated automatic phonographs in the United States.

I am a retired partner of the Chicago and Washington firm of Kirkland, Ellis and Rowe, and the foregoing companies, and other manufacturers who have vanished from the scene, have been represented by partners of my former firm and by me on copyright legislation matters for over forty years. I continue the practice of law in Coudersport, Pennsylvania.

The automatic phonograph manufacturers join the Music Operators of America in their unqualified opposition to H.R. 5345 the so-called Performing Artists Royalty Bill.

This measure would drastically expand the provisions of H.R. 5345 relating to performance royalties in audio or visual recordings by creating a hitherto non-existent right to royalties for public performances via radio, television, coin operated phonographs and background music on the part of "performers" who are defined as "musicians, singers, conductors, actors, narrators and others" whose performance of a literary, musical or dramatic work is embodied in a sound recording.

The multimillion dollar revenues of the existing Performing Rights Societies, ASCAP, BMI, and SESAC, have for years impressed the performers of copyrighted works and the record manufacturers with the apparently limitless potential sources of revenues from the entertainment media and accordingly they are again seeking a share, as a class of persons with the contemplation of the constitutional copyright clause, rights which are under existing law accorded to authors for limited times, to exclusive rights to their writings and discoveries.

Given the obvious economic incentives, those who would create a broad class of performers to be rewarded for their various talents appear to have no difficulty in asking for statutory definition of their royalty entitlement. It goes without saying that to superimpose through the vehicle of copyright an additional royalty fee on the reproduction of sound recordings on jukeboxes and upon radio

and television broadcasters, who already are paying royalties for the use of copyrighted works of composers, authors and publishers, would give rise to substantial additional costs necessarily to be borne ultimately by the consuming public.

Inevitably either new performers rights organizations or expanded existing organizations are required to decide which performers among the myriads of musicians, singers (choruses and choirs), conductors, narrators, actors and others are entitled to share in the new royalty.

The purpose of this memorandum is not to advise the Committee on the resolution of the claimed economic or equitable entitlement of performers as a broad class, but to point out that it is inappropriate in view of the fundamental constitutional questions involved to create a class of literally thousands of potential claimants plus record manufacturers and establishing a precedent for even broader extension of the concept of copyright protection.

The equitable and economic justification for the use of the Federal Copyright Law to extend to record producers is exhaustively analyzed in an article in Volume 43, No. 1, November 1974 issue of *The George Washington Law Review*. In the 86 page study, the authors, Messrs. Robert L. Bard and Lewis S. Kurlantzick ultimately conclude that there is no economical justification for the establishment of a hitherto non-existent public performance right with respect to records. The authors demonstrate that performers are already being adequately compensated for their capacity to produce records attractive to broadcasters. Record and tape piracy, they note, are no longer a threat to manufacturers in view of the Federal and State laws on the subject. The authors conclude with the following statement—particularly relevant in the light of recent focus of attention on the problem of payola:

"Finally, establishment of the public performance right inevitably will increase the existing strong pressures inducing record producers to offer improper inducements to employees of the broadcast industry to get their records played on the air."

The Subcommittee should not simply decide whether the granting of copyright protection to performers and record manufacturers would be "sound policy," although even from a policy standpoint there are sound grounds for excluding the performers from the General Revision. The Committee must work within the constraints imposed by the limited grant of authority conferred by Article 1, Sec. 8, cl. 8 of the Constitution, which gives Congress the following power: "To promote the Progress of Science and Useful Arts, by securing for limited Times to *Authors* and *Inventors* the *exclusive* Right to their respective Writings and Discoveries." (Emphasis added)

The language, purpose and history of this clause demonstrate that it is not a license to confer copyright or patent monopolies on any group who might appear deserving of economic reward, and, as the following paragraph will indicate, an attempt to grant such a monopoly to performers and record manufacturers poses very real constitutional problems.

The issue of "performers' rights" is not one of first impression before the Congress or the Judiciary Committee. Bills have been introduced periodically since 1936 with the objective of creating performers' monopolies. Kaplan & Brown, *Cases on Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical, and Artistic Works* 590 (1969). Congress has heeded before the warning that an attempt to create such rights would go beyond the power of Congress. See *Hearings Before Subcommittee on Patents, Trademarks and Copyrights of the House Committee on the Judiciary on H.R. 1269, 1270 and 2570*, 80th Congress, 1st Sess., ser. 10, at 26, 30, 34–38, 232, 267, 269, 270, 277 (1947).

Two cogent explanations of why copyright protection for performers and record manufacturers would be of dubious constitutionality were developed during the above hearings. First, the Copyright Clause gives Congress the power to afford protection to "Authors and Inventors". A performer, as defined in the Scott Bill is simply not an author much less an inventor. It includes virtually everyone participating in either a major or minor role as an actor, singer, musician and in addition, conductors, narrators and others. The definition of what constitutes a performer whose so called creative talents may be copyrightable is so sweeping that the determination of which performers are to receive royalties and in what amount carry the prospect of new unwarranted economic burdens to the entire entertainment industry including jukebox operators, jukebox manufacturers and the public.

If so broad a definition of "Author" had been intended, then the framers would not have felt called upon to include the word "Inventors" in the Clause. For surely an inventor is as much an author in his field as a performer is in his. The framers, however, expressly included "Inventors" in the Copyright Clause, and from this inclusion one must conclude that the framers intended to have "authors" take its ordinary accepted meaning.

The second basis for rejection was also based on the literal phrasing of the Copyright Clause. This clause authorizes Congress to secure to authors the "exclusive right" to their writings. A performer works with a writing which is usually copyrighted or upon which the copyright has expired but in any event which someone else has authored. Since the author has been granted an "exclusive right" in the work it is simply illogical and unreasonable for the performer to superimpose on such a right a further entitlement to royalties for performing the works or making a record of it.

For these and other reasons prior attempts to enact statutes establishing performers' copyright protection have been rejected. See. e.g. H.R. 1270, 80th Congress, 1st Sess. (1947), reported adversely by a Subcommittee of the House Judiciary Committee, 93 Con. Rec. pt. 15, at p. D406 (1947). There is no reason for suspecting the correctness of Congressional judgment in the past. The Senate in enacting S. 1361 in 1974, deleted the performers' and record manufacturers' royalty. The House Subcommittee has no basis for taking a contrary view.

In spite of the above, the contention has been made that performers should be regarded as authors and their performances should be considered to be writings. It will be argued that changing times have created concepts of authorship and creativity that did not exist when the Constitution was drafted, and that the Constitution must be interpreted to reflect that fact. Admittedly, a capacity for growth must be read into the Copyright Clause. In many instances this argument may have merit, but not in the case of performers as defined in the Scott Amendment or record manufacturers whose creative talents are more along materialistic than aesthetic lines. There were plenty of performers, i.e., actors, musicians, singers, etc., around at the time the Constitution was adopted and it is not conceivable they were regarded as authors in the constitutional sense. Performers are not a new concept although record manufacturers are. If the framers had wanted to create a sweeping monopoly on actors, musicians and other performers they could have done so by simply writing Art. 1, § 8, cl. 8 as follows: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors, Inventors and *Performers* the exclusive right to their respective writings, discoveries and *performances*:" (Emphasis added)

If the Congress feels moved to expand the statutory scope of the Copyright Clause to reach performers and record manufacturers, it must answer affirmatively the following questions: "Does the public interest necessitate the creating of this new type of monopoly?" "Is the country faced with such a shortage of performers of nondramatic art that the public interest requires new incentives to draw people into these fields?" "Are performers and record companies "creators" of writings in the constitutional sense?" Hardly. There appears to be little or no justification from the standpoint of promoting the progress of Science and the Useful Arts for extending the copyright monopoly to performers and record manufacturers. In this connection reference is made to a lead article in Billboard Magazine of July 26, 1975, reflecting the distribution in 1975 to musicians by the record manufacturers of 9.9 million, an increase of 30 percent over the 1974 payoff.

There has been an indicated disposition on the part of the Supreme Court to scrutinize the constitutionality of certain instances of protection granted under the present statute, even in cases where the issue of constitutionality was not raised by the parties. In Mazer v. Stein, 347 U.S. 201, (1954), the Supreme Court held a sculpture was within the scope of the Copyright Act. The pending General Copyright Revision, H.R. 2223, expressly includes sculpture. Justice Douglas, in a concurring opinion in which he was joined by Justice Black, stated that the Court should face the constitutional issue even though not raised. Id. at 219–21. With reference to the Copyright Clause he wrote: "The power is thus circumscribed: It allows a monopoly to be granted only to 'authors' for their 'writings'. Is a sculptor an 'author' and is his statue a 'writing' within the meaning of the Constitution? We have never decided the question." Id. at 219–20.

After listing a number of unlikely articles which the Copyright Office had accepted for copyright the Justice stated: "Perhaps these are all 'writings' in

the constitutional sense. But to me, at least, they are not obviously so. It is time that we came to the problem full face." *Id.* at 221.

Thus, it is evident that there is some doubt even with regard to those things covered in the present act. Mere copying is not copyrightable cf. *Donald* v. *Meyers TV Sales*, 426 F. 2d 1027, *cert. denied* 400 U.S. 892. This is surely not an invitation for Congress to go farther, particularly where the sweeping and unqualified definition of "performers" which includes the catch-all, "others", not only brings a multitude of new potential royalty claimants into the picture but where it would establish a precedent for the creation of royalty entitlement in other naturally talented performers such as figure skaters, golfers, tennis players, basketball players and the like, to say nothing of creative performers such as comedians and news commentators.

The Supreme Court has demonstrated in even more recent cases that it has a preference for curtailing monopoly in the patent and copyright areas. See *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). In these cases the Supreme Court struck down state attempts to extend the property rights of creators beyond those validly granted by the federal patent and copyright laws. The Court expressly stated that, "To forbid copying would interfere with federal policy found in Art. 1, Sec. 8, cl. 8 of the Constitution . . . "*Compco, supra* at 237. This is a policy of allowing monopoly only in limited areas for limited times. Note, however, that the copying is not itself the subject of further copying. To obtain valid copyright the material must be original, although the cases vary widely on the degree of novelty, originality or variation required for a new copyright. 17 U.S. CA § 1 note 13, annotations.

In summary, the Committee must not allow the arguments of contending *economic* interests to obscure Congress' responsibility to remain within the limits defined by the Copyright Clause. This power does not extend to creating a monopoly on the behalf of copiers of already copyrighted works, ie., performers and record manufacturers.

If the economic needs of performers and record manufacturers are relevant to their entitlement to a special royalty so also is the economy of the automatic phonograph manufacturers. In the case of the automatic phonograph manufacturers, which numbered about 10 thirty years ago, three now remain. The three companies are Rock-Ola, Seeburg and Rowe International.

In 1974 the Wurlitzer Corporation, which had manufactured musical instruments since 1856 and automatic phonographs since 1908 discontinued the manufacture of automatic phonographs because of the deteriorating economic climate of the industry. In a letter to shareholders in the 1974 Annual Report, the Company's President said: "The major trouble area affecting the earnings picture during the past year was our coin-operated phonograph business which has been unsatisfactory from the profit viewpoint for the last few years. At a Board of Directors' meeting on March 5, 1974 it was decided to discontinue phonograph manufacturing and selling operations in the United States."

The three surviving manufacturers for whom I speak have not yet benefited from Wurlitzer's withdrawal from competition. Each company has supplied me with information concerning their operations but have requested that I consolidate such information for reasons of competitive confidentiality.

In the aggregate, dollar sales volume and unit production are down between 20 percent and 30 percent. Employment is down drastically, in one company from 1,450 employees to 450 employees. Another company has shutdown production for three months in early 1975. Distributors' inventories in certain instances are as much as 300 percent above normal and sales are not improving.

The juke box business has not kept pace with population growth. It is estimated that there are fewer juke boxes in operation now than in the period 25 years ago after World War II.

The present and prospective monetary contribution of the automatic phonograph industry to the record industry and the performing rights societies is adequate and equitable. Enactment of H.R. 2223 as now drafted will result in a contribution by the operators to the music industry of an estimated $8,500,000.00 a year. This is nearly 10 percent of the total distributions of the performing rights societies ASCAP, BMI and SESAC which in 1974 was reported to be approximately $97.5 million.

The manufacturers believe the operators are contributing their fair share for their use of music and recommend approval of Section 116 of H.R. 2223 as drafted. They oppose H.R. 5345 which would expose the operators to additional unwarranted monetary burdens.

In conclusion I consider it pertinent to note that the Register of Copyrights, Ms. Barbara Ringer, has expressed the opinion that sound recordings as a class are constitutionally capable of copyright protection. Hence, performing artists and record companies may superimpose royalty entitlement on both the copyrighted works of authors and upon compositions in the public domain. If such a simplistic accommodation of the copyright clause of the constitution were to be applied to the resolution of the constitutional entitlement of women to equal rights there would be no need from a constitutional standpoint for the Equal Rights Amendment.

Sincerely,

PERRY S. PATTERSON.